ROYAL COMMISSION ON DIVORCE AND MATRIMONIAL CAUSES.

REPORT

OF

THE ROYAL COMMISSION

ON

DIVORCE AND MATRIMONIAL CAUSES.

Presented to Parliament by Command of His Majesty.

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CONTENTS.

WARRANTS.

Whitehall, November 10, 1909.

The KING has been pleased to issue a Commission under His Majesty's Royal Sign Manual, to the following effect:—

EDWARD R. & I.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to—

Our right trusty and well-beloved Counsellor John Gorell, Baron Gorell, late President of the Probate, Divorce, and Admiralty Division of Our High Court of Justice;

The Most Reverend Father in God Our right trusty and right entirely beloved Counsellor Cosmo Gordon, Archbishop of York, Primate of England and Metropolitan;

Our right trusty and right well-beloved Cousin and Counsellor Edward George Villiers, Earl of Derby, Knight Grand Cross of Our Royal Victorian Order, Companion of Our Most Honourable Order of the Bath;

Our trusty and well-beloved Lady Frances Balfour;

Our right trusty and well-beloved Counsellor Thomas Burt; and

Our trusty and well-beloved—

Charles John Guthrie, Esquire (commonly called the Honourable Lord Guthrie), one of the Senators of our College of Justice in Scotland;

Sir William Reynell Anson, Baronet;

Sir Lewis Tonna Dibdin, Knight, Judge of the Arches Court of Canterbury and of the Chancery Court of York;

Sir George White, Knight;

Henry Tindal Atkinson, Esquire, one of Our Judges of County Courts in England;

May Edith, wife of Harold John Tennant, Esquire;

Rufus Daniel Isaacs, Esquire, one of Our Counsel learned in the Law;

Edgar Brierley, Esquire, Barrister-at-Law, Stipendiary Magistrate of the City of Manchester; and

John Alfred Spender, Esquire;

Greeting!

WHEREAS We have deemed it expedient that a Commission should forthwith issue to inquire into the present state of the law and the administration thereof in divorce and matrimonial causes and applications for separation orders, especially with regard to the position of the poorer classes in relation thereto, and the subject of the publication of reports of such causes and applications; and to report whether any and what amendments should be made in such law, or the administration thereof or with regard to the publication of such reports:

Now know ye, that We, reposing great trust and confidence in your knowledge and ability, have authorised and appointed, and do by these Presents authorise and appoint you, the said John Gorell, Baron Gorell (Chairman); Cosmo Gordon, Archbishop of York; Edward George Villiers, Earl of Derby; Frances Balfour; Thomas Burt; Charles John Guthrie; Sir William Reynell Anson; Sir Lewis Tonna Dibdin; Sir George White; Henry Tindal Atkinson; May Edith Tennant; Rufus Daniel Isaacs; Edgar Brierley; and John Alfred Spender, to be Our Commissioners for the purposes of the said inquiry; and We do hereby empower you to make an interim report with a view of enabling such steps as you may recommend to be taken for the redress of any hardship from which, in your opinion, the poorer classes may suffer under the existing law and administration.

And for the better effecting the purposes of this Our Commission, We do by these Presents give and grant unto you, or any three or more of you, full power to call before you such persons as you shall judge likely to afford you any information upon the subject of this Our Commission; and also to call for, have access to, and examine all such books, documents, registers, and records as may afford you the fullest

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information on the subject, and to inquire of and concerning the premises by all other lawful ways and means whatsoever :

And We do by these Presents authorise and empower you, or any three or more of you, to visit and personally inspect such places as you may deem it expedient so to inspect for the more effectual carrying out of the purposes aforesaid :

And We do by these Presents will and ordain that this Our Commission shall continue in full force and virtue, and that you, Our said Commissioners, or any three or more of you, may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment :

And We do further ordain that you, or any three or more of you, have liberty to report your proceedings under this Our Commission from time to time if you shall judge it expedient so to do :

And Our further Will and pleasure is that you do, with as little delay as possible, report to Us, under your hands and seals, or under the hands and seals of any three or more of you, your opinion upon the matters herein submitted for your consideration.

Given at Our Court at Sandringham, the eighth day of November, one thousand nine hundred and nine, in the ninth year of Our Reign.

By His Majesty's Command,

H. J. GLADSTONE.

Whitehall, May 30, 1910.

The KING has been pleased to issue a Warrant under His Majesty's Royal Sign Manual to the following effect :—

GEORGE R.I.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to all to whom these Presents shall come,

Greeting !

WHEREAS it pleased His late Majesty from time to time to issue Royal Commissions of Enquiry for various purposes therein specified :

And whereas, in the case of certain of these Commissions, namely, those known as—

The Historical Manuscripts Commission,
The Horse Breeding Commission,
The Sewage Disposal Commission,
The Poor Laws Commission,
The Tuberculosis Commission,
The Canal Communication Commission,
The Mines Commission,
The Welsh Church Commission,
The Coast Erosion and Afforestation Commission,
The Vivisection Commission,
The Land Transfer Acts Commission,
The Ancient Monuments (Wales and Monmouthshire) Commission,
The Ancient Monuments (England) Commission,
The Trade Relations between Canada and the West Indies Commission,
The Selection of Justices of the Peace Commission,
The Divorce and Matrimonial Causes Commission,
The University Education in London Commission, and
The Brussels, Rome, and Turin Exhibitions Commission,

the Commissioners appointed by His late Majesty, or such of them as were then acting as Commissioners, were at the late Demise of the Crown still engaged upon the business entrusted to them :

And whereas We deem it expedient that the said Commissioners should continue their labours in connection with the said inquiries notwithstanding the late Demise of the Crown :

Now know ye that We, reposing great trust and confidence in the zeal, discretion, and ability of the present members of each of the said Commissions, do by these Presents authorise them to continue their labours, and do hereby in every essential particular ratify and confirm the terms of the said several Commissions.

And We do further ordain that the said Commissioners do report to Us under their hands and seals, or under the hands and seals of such of their number as may be specified in the said Commissions respectively, their opinion upon the matters presented for their consideration; and that any proceedings which they or any of them may have taken under and in pursuance of the said Commissions since the late Demise of the Crown and before the issue of these Presents shall be deemed and adjudged to have been taken under and in virtue of this Our Commission.

Given at Our Court at Saint James's, the twenty-sixth day of May, one thousand nine hundred and ten, in the first year of Our Reign.

By His Majesty's Command,
R. B. HALDANE.

GEORGE R.I.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, To Our Trusty and Well-beloved Sir Frederick Treves, Baronet, Knight Grand Cross of Our Royal Victorian Order, Companion of Our Most Honourable Order of the Bath, whom We have appointed to be one of Our Sergeant-Surgeons,

Greeting!

WHEREAS by the resignation of Our Trusty and Well-beloved Sir Rufus Daniel Isaacs, Knight, now Our Solicitor-General, a vacancy has been caused in the body of Commissioners appointed by Warrant under the Royal Sign Manual bearing date the eighth day of November One thousand nine hundred and nine to inquire into the present state of the law and the administration thereof in divorce and matrimonial causes and applications for separation orders, especially with regard to the position of the poorer classes in relation thereto, and the subject of the publication of reports of such causes and applications; and to report whether any and what amendments should be made in such law, or the administration thereof, or with regard to the publication of such reports:

NOW KNOW YE that We, reposing great confidence in you, do by these Presents appoint you, the said Sir Frederick Treves, to be one of Our Commissioners for the purposes aforesaid in the room of the said Sir Rufus Isaacs, resigned.

Given at Our Court at Saint James's, the twenty-first day of June, 1910, in the first year of Our Reign.

By His Majesty's Command,
W. S. CHURCHILL.

Sir Frederick Treves, Baronet, G.C.V.O., C.B.,
To be a Member of the Royal Commission on
Divorce and Matrimonial Causes.

TABLE OF CONTENTS.

PART XIII.

PART XIV.

PART XV.

PART XVI.

REPORT OF THE COMMISSIONERS.

To the King's most Excellent Majesty.

May it please Your Majesty,

We the undersigned Commissioners appointed to inquire into the present state of the law of England and the administration thereof in divorce and matrimonial causes and applications for separation orders, especially with regard to the position of the poorer classes in relation thereto, and the subject of the publication of reports of such causes and applications; and to report whether any and what amendments should be made in such law, or the administration thereof or with regard to the publication of such reports, have inquired into the said subjects, and now humbly submit to Your Majesty's consideration the following Report.

PART I.

Introductory.

1. The original Commission was issued by His late Most Gracious Majesty King Edward VII. on 8th November 1909, and after his death, was ratified and confirmed by Your Majesty by warrant dated the 26th May 1910.

To the regret of Your Commissioners, Sir Rufus Daniel Isaacs, who had become Solicitor-General since the date of the original Commission, was at an early stage, viz., in May 1910, compelled, owing to the pressure of his official duties, to resign his appointment as Commissioner, and Your Majesty was pleased to accept his resignation, and in his place, on the 21st of June, 1910, to appoint Sir Frederick Treves, Baronet, G.C.V.O., C.B., to be a member of the Commission.

In March 1911, the Earl of Derby found it necessary, owing to the fact that pressure of business prevented him from giving the attendance that was necessary, especially during the consideration of the report, to resign his office of Commissioner, and Your Majesty was pleased to accept his resignation. Your Commissioners desire to place on record their sincere regret that they have not had the advantage of the assistance of the Earl of Derby in framing this Report.

Sir George White, one of the Commissioners appointed by His Majesty King Edward VII., took an active part in the work of the Commission, and rendered valuable service during the hearing of the evidence, and in the preparation and consideration of this Report. By his death, on the 11th of May 1912, the Commissioners were deprived of the benefit of his wise counsel, his knowledge of affairs, and his great interest in the working people of England, in finally adjusting its terms. But the votes given by him on a series of Resolutions dealing with all the questions involved enable us to say that, subject to what is mentioned in the note on page 99, it expresses in substance the views which he held on these subjects.

Procedure.

2. Your Commissioners were empowered to make an interim report with the view of enabling steps to be taken for the redress of any hardships from which, in their opinion, the poorer classes may suffer under the existing law and administration. This power was, we apprehend, to enable us, at the earliest possible moment, to report upon one of the most pressing and important of the questions referred to us for inquiry and report. That question was raised by a motion made on the 14th of July, 1909, in the House of Lords, by the Chairman of the Commission: "That it is expedient "that jurisdiction to a limited extent in divorce and matrimonial cases should be "conferred upon county courts, in order that the poorer classes may have their cases

Note.—The references given by volume and page and by number are to the volumes and pages of the Minutes of Evidence and to the numbers of the questions. The references to matters in the Appendices are given by the number of the particular Appendix and the page of the volume of Appendices.

" of that nature heard and determined in such courts." The motion did not propose to deal with any alteration in the law of divorce, but it was suggested by the mover that the points raised might touch upon larger matters which required consideration, and that if at the end of the discussion it were thought that there should be further inquiry, either by a committee or by a Royal Commission, into the whole subject of the law of divorce and its administration, the matter might be dealt with in that way without pressing the motion to a decision. The suggestion of a full inquiry appearing to meet with approval, upon an intimation from the Lord Chancellor that His Majesty's Government might take a favourable view of the suggestion, the motion was, by leave, withdrawn.

His late Most Gracious Majesty was afterwards pleased to appoint the Commission as above stated.

3. In the inquiry which we have held, we have found that the evidence relating to the questions which we have had to consider, could not, with convenience, be separated, so as to enable us to make an Interim Report upon the question more particularly raised by the aforesaid motion, and upon which we are expressly empowered to make an interim report, or upon any other point. We, therefore, on the 30th of June, 1910, caused a letter to be addressed by our Secretary to Your Majesty's Secretary of State for Home Affairs informing him that "the Commissioners have come to the conclusion " that, having regard to the complicated nature of the questions which require their " consideration, and the close connection which each of these questions has with " the rest of them, it will be impracticable for them to present an Interim Report of " their proceedings, and that they consider that it would be inexpedient to endeavour " to present a report before they have come to the close of their proceedings."

We now make this report upon all the matters submitted to us for inquiry, proposing to bear in mind the distinction between alterations and improvements in the administration of the law, and amendments of the law, which we suggest should be made. We use the term " divorce " in this Report for divorce *a vinculo*, meaning dissolution of the marriage tie, with liberty to remarry.

4. We have felt from the commencement of our duties the very great gravity of the inquiry. It has involved the consideration of the present state of the law relating to divorce and matrimonial causes, the origin of the present law, the principles on which the law should rest, the administration of the laws, both as to courts and methods, especially in relation to the poorer classes, the advantages and disadvantages of publication of reports of divorce and other matrimonial cases, and generally the regard in which the marriage tie is held, the interests of married persons and their children, the morality of the people, the relationship of the sexes, and the interests of society and the State in these matters and kindred subjects. We have felt that the gravity of the inquiry was enhanced by the fact that some of the questions raised do not touch merely upon human laws and institutions, but are affected by religious beliefs and opinions, and are regarded by many as incapable of solution on mere grounds of public policy, because they are, in their opinion, concerned with man's spiritual welfare as well as with his social conditions.

A full inquiry, such as has taken place before us, does not appear to have been held at any time previously in this country, nor, so far as we are aware, in any other; and although the terms of the Commission only relate, as we interpret them, to the law of England and Wales and its administration therein, it seemed certain that such an inquiry and any recommendations following upon it could not be without influence in other parts of the British Empire and in other countries.

5. We determined to take the evidence in public, except any particular part the character of which made it undesirable that it should be so taken. In coming to this resolution, we had in view the importance of bringing the proceedings to the attention of those whose knowledge might prove useful, and who might thus be led to communicate with us. The result has been the receipt by us of many important communications, which we might not otherwise have received. We also felt it essential to obtain evidence of the most representative character. For this purpose we communicated with all the associations, institutions, churches, bodies, officials and others, whom we thought likely to be of assistance; and we were able through the courtesy of the press to give public notice of our desire to accept evidence from bodies and persons, with whom we had not specially communicated. The result has been the collection of the evidence and materials accompanying the report.

6. We have held 71 sittings, at 56 of which evidence was taken, and we have examined 246 witnesses. We wish to record our recognition of the assistance, which we have derived from the evidence of many of the witnesses, who had obviously taken immense trouble in the preparation of their proofs, and in the collection of materials to place before us. We have also received many communications and have been supplied with much information, which, so far as is material, will be found in the Appendices. The special experience of the witnesses in connection with the questions under consideration, or some of them, may be gathered from the following summary of those who have given evidence.

SUMMARY OF WITNESSES GROUPED.

Judges of the High Court of Justice :
The Right Hon. Lord Alverstone. (Vol. II., p. 119.)
The Right Hon. Sir John Bigham (Lord Mersey). (Vol. I., pp. 38, 65.)
Mr. Justice Bargrave Deane. (Vol. I., p. 49.)

King's Proctor :
The Right Hon. the Earl of Desart (formerly King's Proctor). (Vol. II., p. 135.)

Master of the Supreme Court :
Sir John Macdonell, C.B. (Vol. I., p. 16.)

Registrar of the Probate, Divorce, and Admiralty Division of the High Court of Justice :
A. Musgrave. (Vol. I., p. 10.)

County Court Judges :
His Honour Judge Austin. (Vol. II., p. 18.)
" " " Granger. (Vol. II., p. 24.)
" " " The Hon. W. B. Lindley. (Vol. II., p. 56.)
" " " O'Connor, K.C. (Vol. II., p. 5.)
" " " Ruegg, K.C. (Vol. II., p. 88.)
" " " Sir W. Lucius Selfe. (Vol. I., p. 105.)
" " " Steavenson. (Vol. I., p. 101.)
" " " Woodfall. (Vol. II., p. 40.)

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W. Barradale - - Birmingham. (Vol. I., p. 361.)
F. B. Dingle - - Sheffield. (Vol. I., p. 327.)
J. R. Roberts - - Newcastle. (Vol. I., pp. 332, 347.)
E. C. Sanders - - Liverpool. (Vol. I., p. 364.)

Chief Constables:

T. W. Byrne - - Worcester. (Vol. I., p. 390.)
T. M. Harris - - Wakefield. (Vol. I., p. 385.
Major Malcolm - Kingston-upon-Hull (Vol. I., p. 395.)
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J. D. Sowerby - - Plymouth. (Vol. I., p. 393.)

Police Court Missionaries and Rescue Workers:

F. W. Barnett - - London. (Vol. II., p. 279.)
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R. Holmes - - Sheffield. (Vol. II., p. 240.)
T. Holmes - - London. (Vol. II., p. 232.)
W. Lightfoot - - Nottingham. (Vol. II., p. 257.)
J. Massey - - London. (Vol. II., p. 284.)
W. Mundin - - St. Albans. (Vol. II., p. 264.)
J. Palin - - - Middlesbrough. (Vol. II., p. 248.)
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Bishops and Clergy of the Church of England :

The Lord Bishop of St. Albans. (Vol. II., p. 340.)
The Lord Bishop of Birmingham. (Vol. II., p. 347.)
The Lord Bishop of Ely. (Vol. II., p. 431.)
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Rev. J. E. Watts-Ditchfield. (Vol. II., p. 310.)
Rev. H. Williams. (Vol. III., p. 335.)

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C. N. Johnston, K.C. (Vol. III., p. 345.)
The Right Rev. P. M'Adam Muir. (Vol. III., p. 339.)

Witnesses representing other Churches and Religious Institutions:

Dr. Hermann Adler	Chief Rabbi. (Vol. III., p. 406.)
D. L. Alexander, K.C.	President of the London Committee of Deputies of the British Jews. (Vol. III., p. 412.)
R. L. Blackburn, K.C.	The Episcopal Church of Scotland. (Vol. III., p. 320.)
Frederic Harrison	The Positivists. (Vol. III., p. 355.)
H. S. Q. Henriques	Vice-president of the London Committee of Deputies of the British Jews. (Vol. III., p. 415.)
H. W. Hill	The English Church Union. (Vol. III., pp. 363, 373.)
Rev. J. D. Jones	The Congregational Union. (Vol. III., p. 434.)
Father Michael Kelly	Roman Catholic Church. (Vol. III., p. 328.)
Rev. J. Scott Lidgett	The Wesleyan Methodists. (Vol. III., p. 332.)
The Right Rev. Monseigneur Moyes	Roman Catholic Church. (Vol. II., p. 426.)
Rev. E. Gordon Savile	The Church of England Men's Society. (Vol. III., p. 324.)
Isaac Sharp	The Society of Friends. (Vol. III., p. 361.)
A. J. Shepheard	The Congregational Union. (Vol. III., p. 427.)
Rev. E. G. Wood	The English Church Union. (Vol. III., p. 367.)

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Dr. Emery Barnes	Cambridge. (Vol. III., p. 317.)
Professor Cooper	Glasgow. (Vol. III., p. 301.)
Professor Denney	Glasgow. (Vol. III., p. 262.)
Rev. C. W. Emmet	Steventon. (Vol. III., p. 297.)
Canon Hensley Henson	London. (Vol. II., p. 404.)
Dr. Inge	Cambridge. (Vol. III., p. 252.)
Professor W. P. Paterson	Edinburgh. (Vol. II., p. 441.)
Canon Hastings Rashdall	Hereford. (Vol. III., p. 306.)
Dr. Sanday	Oxford. (Vol. III., p. 237.)
Dr. Swete	Cambridge. (Vol. III., p. 316.)
Professor Whitney	London. (Vol. III., p. 274.)

The Press:

Russell Allen	"Manchester Evening News." (Vol. III., p. 188.)
C. Moberly Bell	"The Times." (Vol. III., p. 198.)
D. Edwards	"Nottingham Daily Express." (Vol. III., p. 521.)
H. A. Gwynne	"The Standard." (Vol. III., p. 205.)
H. Hodge	"The Saturday Review." (Vol. III., p. 210.)
A. G. Jeans	"Liverpool Daily Post." (Vol. III., p. 181.)
Sydney Low	"St. James' Gazette" (formerly). (Vol. III., p. 510.)
J. S. R. Phillips	"Yorkshire Post." (Vol. III., p. 214.)
C. P. Scott	"Manchester Guardian." (Vol. III., p. 518.)
J. T. Smith	"National Union of Journalists." (Vol. III., p. 193.)
W. T. Stead	"Review of Reviews." (Vol. III., p. 514.)
J. St. Loe Strachey	"The Spectator." (Vol. III., p. 222.)

Medical:

The Lord Chancellor's Visitor in Lunacy:

Sir J. Crichton-Browne	London. (Vol. III., p. 59.)

Lunacy Commissioners:

E. Marriott Cooke	London. (Vol. III., p. 80.)
Sydney Coupland	London. (Vol. III., p. 68.)
F. Needham	London. (Vol. III., p. 76.)

Medical—continued.

Lunacy Experts:

James Chambers		London. (Vol. III., p. 101.)
Sir T. S. Clouston	Of the British Medical Association.	Edinburgh. (Vol. III., p. 2.)
T. B. Hyslop		London. (Vol. III., p. 20.)
Robert Jones		Claybury. (Vol. III., p. 11.)
W. D. Moore		Virginia Water. (Vol. III., p. 396.)
Sir G. H. Savage		London. (Vol. III., p. 105.)

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F. S. D. Hogg	Rickmansworth. (Vol. III., p. 406.)

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Jane Walker	London. (Vol. III., p. 23.)
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Helen Webb	London. (Vol. III., p. 29.)
E. M. Glynn Whittle	Liverpool. (Vol. III., p. 126.)

British Medical Association:

J. Smith Whittaker	London. (Vol. III., p. 1.)

Eugenics Education Society:

M. H. Crackanthorpe, K.C.	London. (Vol. III., p. 84.)
J. E. Lane	London. (Vol. III., p. 100.)
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O. F. N. Treadwell	Parkhurst. (Vol. III., p. 381.)
W. H. Winder	Aylesbury. (Vol. III., p. 380.)

Medical Officers of Health:

S. G. H. Moore	Huddersfield. (Vol. III., p. 120.)
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Other Witnesses representing Associations, &c.:

J. G. Silcock, L. Foulkes-Jones	Associated Societies for the Protection of Women and Children. (Vol. II., pp. 396, 402.)
W. Milledge	Bradford City Guild of Help. (Vol. II., p. 393.)
W. Ramsay Fairfax, R. T. Gates	Divorce Law Reform Union. (Vol. I., pp. 208, 212.
R. P. Clayton	Liverpool Society for the Prevention of Cruelty to Children. (Vol. III., p. 429.)
Hon. Mrs. Hubbard, Mrs. Church, Mrs. Steinthal	The Mothers' Union. (Vol. II., pp. 189, 196, 205.)
Rev. A. R. Buckland	National Council of Public Morals. (Vol. III., p. 223.)
R. J. Parr	National Society for the Prevention of Cruelty to Children. (Vol. III., p. 133.)
Miss Broadhurst	Political Reform League. (Vol. III., p. 39.)
Ninian Hill	Scottish National Society for the Prevention of Cruelty to Children. (Vol. III., p. 145.)

The Right Hon. Sir David Brynmor Jones, K.C., M.P.	Secretary of the Welsh Liberal Parliamentary Party (formerly a County Court Judge). (Vol. III., p. 498.)
Miss M. Llewelyn Davies.	Women's Co-operative Guild. (Vol. III., p. 149.)
Mrs. E. Barton -	,, ,, ,, (Sheffield Branch). (Vol. III., p. 171.)
Mrs. Homan - -	Women's Industrial Council. (Vol. III., p. 173.)
Lady Bamford-Slack	Women's Liberal Federation. (Vol. III., p. 38.)

Other Witnesses:

Fru Ella Anker -	Norway. (Vol. II., p. 478.)
Mrs. Fawcett - -	London. (Vol. II., p. 371.)
Maurice Hewlett -	Author—London. (Vol. III., p. 523.)
Mrs. Hodder - -	Church Army Worker—London. (Vol. III., p. 384.)
W. H. Jones - -	Alderman of Stepney Borough Council. (Vol. II., p. 324.)
Mrs. Swanwick -	Manchester. (Vol. II., p. 459.)
G. B. C. Yarborough	Chairman of the West Riding Quarter Sessions. (Vol. II., p. 338.)

In addition to these witnesses, a number of societies, associations, and other bodies and individuals were invited to give evidence before us, but for one reason or another did not feel in a position to do so.

7. We have received resolutions passed at meetings of numerous bodies, copies of which will be found in Appendix XXV., pp 162–71.

We have also received a very large number of letters and communications from various persons calling attention to particular points and to individual cases. These documents appeared to us to be bonâ fide in character. They are too numerous to print as a whole in the Appendix, but copies have been made of a sufficient number of them to illustrate fairly the nature of each point with which they deal; these will be found in Appendix XXVI., pp. 172 *et seq.*

We have also had put in evidence by—

(1) Sir John Macdonell.—Historical sketch of the laws relating to divorce. Vol. I., pp. 31–7.

(2) Sir Lewis Dibdin.—Notes on the Reformatio Legum Ecclesiasticarum. Vol. III., pp. 44–58.

(3) The Chairman.—Notes on the principles on which divorce legislation should proceed. Vol. III., pp. 527–48.

(4) The Secretary.—A summary of the laws relating to divorce in other countries and colonies. Vol. I., pp. 4–10.

The Assistant Secretary has at the request of the Commissioners prepared a memorandum on the history of the law of divorce, Appendix I., pp. 3–22, and a memorandum on the names of women after divorce, Appendix XXVIII., p. 191.

There are also to be found in the Appendices, memoranda and notes from some of the witnesses explanatory of their views and adding thereto. Besides these documents, our attention has been drawn by some of the witnesses, and otherwise, to many learned works on the subjects with which we have been concerned.

8. We may here state that, from the outset, it was apparent that certain main questions would require investigation, such as the providing of adequate means for all classes to bring their cases before the courts; the exercise, by courts of summary jurisdiction, of their powers with regard to separation orders; the consideration of the position of women relatively to men; the grounds upon which divorce and judicial separation should be permitted, and the publication of reports of divorce and matrimonial cases. But the evidence has brought to our attention numerous other important questions, which will be dealt with hereafter. In the treatment of these numerous questions, a certain amount of repetition has been found unavoidable.

PART II.

The Present State of the Law.

9. Before considering the historical aspect of the questions involved it may be convenient to state how the law stands at present. The present state of the law of England relating to divorce and matrimonial causes depends upon the Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85) and the Acts amending the same, hereafter referred to, according to which a husband may obtain a dissolution of his marriage on the ground that his wife has, since the celebration thereof, been guilty of adultery, and a wife may obtain a dissolution of her marriage on the ground that, since the celebration thereof, her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro*, or of adultery, coupled with desertion, without reasonable excuse, for two years or upwards.

The Act of 1857 constituted a court in London called "The Court for Divorce and Matrimonial Causes," by which the law was to be administered, and transferred to that court the jurisdiction formerly and then vested in the ecclesiastical courts in respect of divorces *a mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and other matrimonial causes suits and matters, except in respect of marriage licences. This court was, by the Judicature Acts, consolidated with the Supreme Court of Judicature in England; its jurisdiction was transferred to and vested in the High Court of Justice; and divorce and matrimonial causes were assigned to the Probate, Divorce, and Admiralty Division of the said High Court (hereinafter called for brevity the Divorce Division).

10. Thus a new jurisdiction was created, which enabled a court of law to grant decrees dissolving marriages. The same court was to exercise the powers of the old Ecclesiastical Courts; and desertion for two years and upwards was made a new ground for divorce *a mensâ et thoro*, which then became termed judicial separation.

The principal suits over which the former Ecclesiastical Courts exercised jurisdiction before 1857 were:—

(1) Suits for divorce *a mensâ et thoro*. By the decree the parties to a marriage were separated, but the marriage tie was not dissolved. The grounds were (*a*) adultery, (*b*) unnatural offences, (*c*) cruelty, and there was no distinction of sex.

(2) Nullity suits: The object of these was to declare a marriage null (1) as being void, where there was no consent, or the marriage was invalidly contracted, or was within the prohibited degrees, or was bigamous, or (2) as being voidable, as in the case of impotence.

(3) Suits for the restitution of conjugal rights. Since 1884, disobedience to a decree in such a suit involved certain pecuniary consequences, and the party disobeying was treated as guilty of desertion for two years and upwards, and was liable to a suit based on such desertion.

(4) Suits for jactitation of marriage. These were so rare as to call for no statement.

The amending Acts dealt mainly with procedure and practice, and made no change with regard to the grounds upon which divorce could be obtained.

11. By other Acts, courts of summary jurisdiction were given certain powers to separate husbands and wives. These powers have been largely exercised, and many important questions are raised with regard thereto, but as these courts do not deal with divorce, we propose to consider them separately hereafter.

PART III.

Historical.

12. It is unnecessary, in our view, to enter in this Report into any detailed examination of the causes—religious, social, and political—and of the course of events which led up to the passing of the Divorce Act of 1857. For a full discussion of the religious questions involved, we refer to the evidence laid before us, representing all shades of theological opinion. The social and political questions, as these have affected different countries in successive ages, and England in particular, are discussed in the

Notes contained in the Chairman's evidence (Vol. III., p. 527), to which we draw special attention; Sir John Macdonell's historical sketch (Vol. I., p. 31); Sir Lewis Dibdin's Memorandum (Vol. III., p. 42); Mr. Abrahams' account of the Jewish Law and Customs (Vol. III., p. 228); and the historical memorandum prepared by Mr. de Montmorency, the Assistant Secretary of the Commission (App. I., p. 3). We have also been referred to the works of various writers on these subjects, including "A History of Matrimonial Institutions," by Eliot Howard, Ph.D., Lecturer in the University of Chicago, published in 1904.

13. Turning to the historical aspect of the question, we content ourselves with pointing out that in all ages and countries and under all religious systems, serious breach of the obligations involved in matrimony has been always regarded as constituting a legal as well as a moral wrong and as entitling the innocent spouse to a legal remedy. In England the Ecclesiastical Courts at an early date acquired complete jurisdiction over questions of marriage and divorce, there being an ultimate appeal from their decisions to Rome, which was abolished by 24 Henry VIII. c. 12.

The only divorce, which the pre-Reformation Church recognised and its Courts granted, was a divorce *a mensâ et thoro* (equivalent to what is now termed a judicial separation), as the Church held that a valid marriage between Christians was indissoluble. The hardships which result from holding marriage indissoluble were, however, mitigated by a system of effecting complete divorce by means of decrees of nullity, the grounds for which were numerous. Referring to the rules as to the forbidden degrees of consanguinity and affinity, Sir Lewis Dibdin (*ib.*) says: "These "elaborate and highly artificial rules produced a system under which marriages "theoretically indissoluble, if originally valid, could practically be got rid of by "being declared null *ab initio* on account of the impediment of relationship. This "relationship might consist in some remote or fanciful connection, between the "parties or their godparents, unknown to either of them until the desire to find a "way out of an irksome union, suggested minute search into pedigrees for obstacles "—a search which somehow seems to have been generally successful." The grounds still recognised by the Roman Catholic Church for declaring a marriage null are given by Monseigneur Moyes as 15 in number (22,921).

At the Reformation these causes of nullity became no longer recognised by English law as available for nullifying a marriage duly contracted, and the effect of the doctrine of indissolubility was thereby enhanced; but it was then contemplated that there should be a general examination into and reform of ecclesiastical law and procedure. The subject was considered (*see* Sir Lewis Dibdin, *ib.*), but no general reform of the ecclesiastical law relating to divorce or of the courts, which administered it, was effected. Opinion had, however, changed with regard to the theory of the indissolubility of marriage, the Reformers maintaining that marriage was not indissoluble, and as relief by means of decrees of nullity was no longer available as before, resort was had to the Legislature for private Acts of Parliament authorising divorce and remarriage, in the absence of civil tribunals capable of dealing with suits for divorce *a vinculo*.

14. The first Acts dealing with particular marriages passed in the years immediately prior to the English Reformation were those relating to Henry VIII. In 1533–4, by 25 Hen. VIII. c. 22 his marriage with his first wife Katherine was declared void. In 1536, by 28 Hen. VIII. c. 7, s. 1, his marriage with Anne Boleyn was found to be utterly "voyde and of none effecte; by reason whereof your Highnes was and "is lawfully devorced and separated from the bondes of the said mariage in the lyffe "of the said Lady Anne." In 1540, the Statutes 32 Hen. VIII. c. 25 declared the "pretensed mariage with the Lady Anne of Cleves" to be "itselfe nought and of noo force," and the parties were at liberty and pleasure "to contracte matrimony and mary" (s. 1). These were in form declarations of nullity.

The Assistant Secretary in his notes also refers to some early bastardy and legitimation acts.

15. The first Act which can be considered a private divorce Act (unless possibly that of Sir Ralph and Lady Sadler of 1545 referred to in the last-mentioned notes) (37 Hen. VIII., c. 30), related to the Marquess of Northampton. Having obtained a decree of the Ecclesiastical Court separating him from his wife on the ground of her adultery, he married again. A Commission of delegates, headed by the Archbishop of Canterbury, and appointed on the petition of the Marquis, declared the

second marriage valid; and by a Statute of 1551–2, 5 & 6 Ed. VI. [No. 30], the second marriage was declared valid by the law of God, any decretal canon, ecclesiastical law or usage to the contrary notwithstanding, and their children legitimate; but this Act was repealed in 1553 by 1 Mary [Stat. 2, No. 30].

In 1552 legislation was proposed to the effect that "no man shall put away his "wife, and marry again, unless he shall be lawfully divorced before some competent "ecclesiastical judge," but no statute resulted. (*See* the notes last mentioned, App. I., p. 19.)

We do not think it necessary to refer to the few acts and cases mentioned in those notes prior to the latter part of the 17th century.

The Ecclesiastical law as to divorce remained unchanged by statute, but, from facts collected in those notes, it may be gathered that, after the Reformation, people for a time not infrequently regarded themselves as entitled to re-marry, after, or without a divorce *a mensâ et thoro*. (*See* the notes by Sir Lewis Dibdin (Vol. III., p. 56, c. CI.), Latimer's Last Sermon before Edward VI. (Vol. III., p. 296)). The bond required by the 107th Canon of 1603–4 against re-marrying after a decree of divorce *a mensâ et thoro* appears to have been directed against such remarriages.

But whatever confusion there may have been in some men's minds, and whatever irregularities may have taken place in the times immediately following the Reformation, we find subsequently recognition by all of the fact that without a private Act a valid marriage could not be dissolved. The practice of obtaining private Acts in order to dissolve marriages commenced in the latter part of the 17th century.

Box's case in 1701 appears to have been one of the first, if not the first case, where, without any special circumstances, the Legislature granted a divorce *a vinculo* after sentence in the Arches Court.

16. From the end of the 17th century, Acts of Parliament dissolving marriage became frequent. The Commissioners appointed to inquire into the law of divorce in 1850, in the 26th paragraph of their report state as follows:—

> "By these means the right to obtain a divorce *à vinculo* was definitively established. It was established, however, in the rudest and most inconvenient manner; for the proceeding was a judicial one by a legislative process, and it had all the inconveniences which necessarily result from the discussion of such a question in a mixed and popular assembly. At first only a few divorce bills were passed—not more than five were carried through Parliament before the accession of the House of Hanover. From 1715 to 1775 their number was 60, that is to say, they averaged about one a year. From 1775 to 1780 they had increased to 74, that is to say, upon an average, to about three a year: and from 1800 to 1852, they amounted to 110. Two of these, viz., *Lady Macclesfield's* and the *Duke of Norfolk's cases* were without any sentence ecclesiastical: and several were without any previous verdict at law; for no standing orders of either House of Parliament required the institution of these Parliamentary [*sic.* preliminary] proceedings until the year 1798."

17. In 1798 certain orders of the House of Lords regulating the practice with regard to these private Acts of Parliament were passed at the instigation of Lord Chancellor Loughborough, and, after the passing of these orders, applications for divorce *a vinculo* to Parliament were supported by ecclesiastical sentences and verdicts at law in actions of crim. con. or circumstances were alleged, which justified or explained the want of such verdicts. That practice was followed until the Matrimonial Causes Act, 1857, abolished this elaborate and costly method of obtaining the benefit of divorce. But this abolition did not extend to Ireland: the old practice is still in force in that country, and cases of divorce from Ireland are dealt with by an Act of Parliament passed through both Houses. In the course of the proceedings the facts are brought before a committee of learned Lords, who hear the evidence of the parties and report as to the right to a divorce, and the Bill also passes through Committee in the House of Commons.

18. Whatever may have been the opposition to the first few cases in Parliament, the general practice which was established was of a judicial rather than a legislative order, and the cases appear to have been disposed of on their merits. This practice was confined to cases of adultery. No general investigation was made as to the principles upon which divorce should proceed, but the opinion that adultery was a good ground of divorce was adopted and acted on.

19. All the private acts which were passed in pursuance of this practice, except four, were in favour of husbands against wives. The excepted four were by wives against husbands in aggravated circumstances. The grounds of a distinction being made between men and women will be considered later. At present it is sufficient to say that the offence appears to have been considered greater, and its consequences more serious in the case of a woman than in that of a man; forgiveness seems to have been more naturally expected in the former case than in the latter.

PART IV.

The Royal Commission of 1850.

20. It seems extraordinary that an inquiry into the state of the laws and procedure connected with matrimonial causes should have been so long delayed, and that reforms should not have been introduced before the middle of the 19th century. For, according to common law as well as Ecclesiastical law and practice, divorce remained unrecognized; but the Legislature recognized it, in case of a wife's adultery, and, in case of a husband's, when his adultery was accompanied with aggravating circumstances, by giving a remedy, as we have shown, through what was in form a legislative, but in substance a judicial, proceeding, which was open, as a matter of course, on sufficient evidence, to anyone who was rich enough to pay for it. The cost and inconvenience were, however, so great that the remedy was obviously beyond the means of the great bulk of the community. The ironical observations of Mr. Justice Maule in a case of bigamy (*R.* v. *Hall*, 1845) on the subject are well known, and as this judgment made a deep and lasting impression it may be usefully quoted here.

> "Mr. Justice Maule, in passing sentence, said, that it did appear that he had been hardly used. It was hard for him to be so used, and not to be able to have another wife to live with him, when the former had gone off to live in an improper state with another man. But the law was the same for him as it was for a rich man, and was equally open for him, through its aid, to afford relief; but, as the rich man would have done, he also should have pursued the proper means pointed out by law, whereby to obtain redress of his grievances. He should have brought an action against the man who was living in the way stated with his wife, and he should have obtained damages, and then should have gone to the Ecclesiastical Court and obtained a divorce, which would have done what seemed to have been done already, and then he should have gone to the House of Lords, and, proving all his case and the preliminary proceedings, have obtained a full and complete divorce, after which he might, if he liked it, have married again. The prisoner might perhaps object to this that he had not the money to pay the expenses, which would amount to about 500*l.* or 600*l.*—perhaps he had not so many pence—but this did not exempt him from paying the penalty for committing a felony, of which he had been convicted. His Lordship might, perhaps, have visited the crime more lightly if the prisoner had not misrepresented himself as a bachelor to Maria Hadley, and so deceived her. If he had told her the circumstances, and said, 'Now I'll marry you if you like to take the chance,' &c.; but this he had not done, and thus he had induced her to live with him upon terms which she perhaps else would not have done. It was a serious injury to her, which he had no right to inflict because his wife and others had injured him. For this offence he must receive some punishment, and the sentence was, that he be imprisoned and kept to hard labour for four months, which he hoped would operate as a warning how people trifled with matrimony."*

We also refer to the remarks of the Lord Chancellor (Lord Cranworth) on the elaborate procedure then necessary. When moving the second reading of the Bill of 1857, he said: "To the investigation of the question on three different occasions "there was the grave objection, if no other, that such complicated proceedings were "too expensive for the pockets of any but the richest sufferers, and that relief was "put beyond the reach of all but the wealthiest classes." (Hansard, vol. 145, 489.)

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* *Regina* v. *Thomas Hall*, alias *Thomas Rollins* (Midland Circuit, Warwick: Mr. Justice Maule, April 1st, 1845. Reported in "The Times," April 3, 1845). A somewhat different version appears in "Democracy and Liberty," by William E. H. Lecky (1896), Vol. II., pp. 166, 167, and some other variants have been current. (*See* "The Times," January 27, 1857.)

21. At length in 1850 a Royal Commission was appointed, consisting of Lord Campbell, Dr. Lushington, Lord Beaumont, Lord Redesdale, Mr. E. P. Bouverie, the Right. Hon. S. H. Walpole, K.C., and Vice-Chancellor Sir William Page Wood (Lord Hatherley), "to enquire into the present state of the law of divorce in this "country, and more particularly into the mode of obtaining a divorce *a vinculo* "*matrimonii*, in this country."

The report was signed by all the Commissioners except Lord Redesdale, who gave a statement of his reasons for not entirely concurring in the report. The Commissioners reported in 1853, and their report and the evidence on which it was founded have been placed before the present Commission. The Commissioners examined only two witnesses—viz., John Sheppard, Esq., deputy registrar of the Consistory Court of London, and George Bradford Ellicombe, Esq., a parliamentary agent; but they had also the evidence bearing on the question of divorce which was given before a Select Committee of the House of Lords appointed in 1844, to consider Lord Brougham's Bill presented in that year to amend the jurisdiction of the Committee of the Privy Council. The witnesses before that Committee were the Right Hon. Stephen Lushington, LL.D., the judge of the Consistory Court of London since 1828, and judge of the High Court of Admiralty; Sir John Stoddart, the eminent civilian; Lord Brougham, who only gave evidence as to a statement he had received from a lady; Henry Birchfield Swabey, Esq., the registrar of the High Court of Admiralty, who had been a proctor since 1810; the Lord Advocate of Scotland (the Right Hon. Duncan M'Neill, afterwards Lord Colonsay); and J. A. Maconochie, Esq., a member of the Scottish Bar, examiner to the Consistory Court. Certain documents were also put in evidence (*see* p. 71 *et seq.* of that report).

22. The inquiry, although it led to the Act of 1857, which was founded on the report, was not of an exhaustive character on the whole question of divorce and separation. Indeed, the country was then not prepared for such an inquiry, and that which was made was mainly directed to the substitution of a proper legal tribunal for the procedure by private Acts of Parliament, in cases where it was sought to effect a complete dissolution of marriage. Lord Campbell, who was Chairman of the Commission of 1850, stated in the House of Lords that the object of the Commissioners was not to alter the law but the procedure by which the law was carried into effect. (Hansard, 3rd series, vol. 145, 512.)

23. Influenced, no doubt, by views entertained at that day derived from Scripture as then understood, and the opinions of the authors mentioned by them in the 35th to 40th paragraphs of their report, the Commissioners recommended few material changes, except such as arose from the change of tribunal. They expressed their opinion that grounds of divorce *a mensâ et thoro* should be adultery and cruelty (which had always been recognised as such by the ecclesiastical courts), and wilful and obstinate desertion, which they considered "so entirely frustrates all the objects "of the marriage union, that it may reasonably be doubted whether it should not "be put on the same footing as cases of cruelty." But, because the evils arising from adultery could not "necessarily be predicated as the certain results of the "other causes; for in them at least there is always a possibility of future recon-"ciliation," they were of opinion that divorce *a vinculo* should not be extended beyond cases of adultery (paragraphs 38, 39). Following the practice of the House of Lords, they considered that the wife's position was different from that of the husband, and thus "in cases of incest, bigamy, or the like, it might be proper to give "the wife the power to institute a suit for a Divorce *a vinculo matrimonii*, but as "a general rule, and in all other cases of aggravated enormity, which may possibly "arise, but cannot be defined, we think that the remedy should be left for the "Legislature, and for that alone." They then proceeded to deal with the grounds of defence which should operate as a bar in a suit for divorce, with the terms upon which divorces should be granted, and the legal consequences with which they should be attended, and then they considered the court or courts, and mode of procedure which should be established. They were "of opinion, that in this, as in every case "which has to be submitted to judicial investigation, one tribunal (subject to an "appeal in the event of a miscarriage) is or ought to be sufficient of itself for "administering to the suitors complete justice without having recourse to extraneous "aid"; and they recommended the constitution of a new tribunal for applications for divorce *a vinculo matrimonii* and all causes matrimonial, with an appeal to the House of Lords, and indicated the nature of the procedure which should be adopted.

PART V.

The Act of 1857.

24. The Matrimonial Causes Act of 1857 was passed after much debate in both Houses of Parliament. In introducing the Bill in the House of Lords, Lord Chancellor Cranworth stated that "nothing would induce him to submit a Bill which he "believed would have the slightest tendency to shake the confidence of the country "in the permanency, if not the absolute indissolubility, of the marriage tie. He "believed that the fact of that tie being absolutely binding through life, except "in very extreme cases, was the foundation of some of the best interests of society." After giving a short account of the history of the law, the changes of opinion brought about at the time of the Reformation, and the methods of divorce by private Acts of Parliament, he stated that the law should be made to conform to practice, *i.e.*, as in Parliament, and that "the main object of this Bill was to constitute a court which "should be competent to decree as a matter of right that relief in favour of persons "who had just matter of complaint, which could now only be obtained by means of "an Act of Parliament." He then referred to the parliamentary procedure, to some minor points, to the addition of some other causes, to the special circumstances under which a wife might obtain a divorce against an adulterous husband, more especially desertion, to the wife's position as regards property, and to the maintenance and extension of divorce *a mensâ et thoro*. He concluded thus: "Its object" [*i.e.*, of the Bill] "was to do away with the remedy of private legislation for such persons only "as could afford to obtain a divorce by Act of Parliament, and in cases which were "now relieved by the Ecclesiastical Courts, to give relief by a court especially "constituted for that purpose; and, under cases of lesser evil, to confer upon the "wife all those privileges which she was under the circumstances fully entitled to "obtain." (Hansard, 3rd series, vol. 145, 483–94.)

25. In the House of Commons the point was again made that the Bill was mainly to amend procedure and not to alter the law. The Attorney-General, Sir Richard Bethel, on the order for second reading, said: "The Bill involved only long existing "rules and long established principles, and it was intended to give only a local "judicial habitation to doctrines that had been long recognised as part of the law "of the land, and for a century and a half administered in a judicial manner, "although through the medium of a legislative assembly. Its object was to remove "the inconveniences of that practice, but in all other respects the law of England "upon the subject of divorce would remain what it was now." (Hansard, 3rd series, vol. 147, 718–9.)

26. Efforts were made by Lord Lyndhurst and others to amend the Bill by making the position of a woman the same as that of a man with regard to the grounds of divorce, and for making wilful desertion a ground of divorce; but besides the objections made by those members who opposed the Bill in both Houses, objection was made by the Government that to do so would be going beyond the main object of the Bill. For instance, the Attorney-General, in speaking on an amendment which was proposed in Committee to give a wife, as a ground of divorce, "adultery committed in the conjugal residence," said:—

> "The duty which we have now, however, to discharge is a limited one. It is merely to embody the law of divorce which at present exists, and I know of no private Bill ever having been granted which has embodied the principle which I am now blamed for refusing to discuss. If this Bill were once thrown aside, and the whole law of marriage and divorce made the subject of inquiry, then I should be the last man to limit the field of discussion, or to refuse to consider a state of law which inflicts injustice upon the woman most wrongfully and without cause, and which may be considered opprobrious and wicked. We are now, however, limited to the performance of that duty which this Bill imposes upon us—namely, to erect a new tribunal and to embody the principles of law which already exist. . . . this present Bill need not be the end-all of legislation upon the subject. By this Bill we shall create a tribunal which may hereafter have to administer other laws made under happier auspices."

This amendment was, however, accepted by the Committee, but struck out in the House of Lords. In the House of Commons, Mr. Drummond made an unsuccessful attempt to introduce cruelty alone as a ground of divorce. (Hansard, vol. 147, 1587.)

27. Considerable discussion took place as to giving local jurisdiction in matrimonial cases. At that time the circumstances were different from what they are now; for instance, the county courts, which were created in 1846 for the recovery of small debts, had not attained the position which they now occupy, and although it was pointed out that expense and inconvenience would probably prevent the court in London from being accessible to the poorer classes, no local jurisdiction was given, except to the assize judges in cases of judicial separation and restitution of conjugal rights (*see* section 17 of the Act of 1857; this jurisdiction was taken away by an amending Act of 1858, probably because it was not found workable). We may here notice that the Consistory Courts held at the different diocesan centres could, before 1857, exercise the ecclesiastical jurisdiction at those centres; and at some of those courts, viz., York, Chester, Gloucester, Norwich and Durham, a certain number of cases were heard in addition to those disposed of in London. But the new legislation put an end to all local jurisdiction, and none has since been established, except under the Acts relating to courts of summary jurisdiction (*see* Hansard, vol. 147, 379).

28. The Bill ultimately became the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and reference must now be made to those provisions of the Statute which are most material to the principal points in this inquiry. By section 2, all jurisdiction then exerciseable by any Ecclesiastical Court in England in respect of divorces *a mensâ et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, was to cease, except so far as relates to the granting of marriage licences; and (section 6) such jurisdiction, together with the jurisdiction conferred by the Act, was to be exercised by a new court to be called "the Court for Divorce and Matrimonial Causes." Instead of a decree of divorce *a mensâ et thoro*, a decree of judicial separation was to be pronounced (section 7). After provisions for the judges by whom the cases were to be heard (afterwards amended by subsequent Acts so as to leave the jurisdiction of the court to be exercised by a single judge), it was provided, by the 12th section, that the court should hold its sittings at such place or places in London or Middlesex or *elsewhere*, as Her Majesty in Council should from time to time appoint.

The provision as to the court sitting *elsewhere* has never been put in force, and, indeed, if one judge were to administer the jurisdiction conferred it would be impossible for him to do so at any other place than in London, having regard to the amount of business.

Section 16 added to the causes for which a judicial separation might be obtained, either by the husband or the wife (that is to say, adultery or cruelty), desertion without cause for two years and upwards.

According to section 22, the court, in all proceedings other than those to dissolve a marriage, was to proceed and act and give relief on the principles and rules of the Ecclesiastical Courts, but subject as therein mentioned.

Section 27 provided that a husband might present a petition to the court, praying that his marriage might be dissolved on the ground that his wife had, since the celebration thereof, been guilty of adultery; and that a wife might present a petition to the court, praying that her marriage might be dissolved on the ground that, since the celebration thereof, her husband had been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

With regard to defences beyond a denial of the facts, it was provided, in section 30, that the court should dismiss the petition, if it should find that the petitioner had during the marriage, been accessory to, or conniving at the adultery of the other party to the marriage, or had condoned the adultery complained of, or that the petition was presented or prosecuted in collusion with either of the respondents; and, in section 31, that, in case the court should be satisfied on the evidence that the case of the petitioner had been proved and should not find that the petitioner had been guilty of any of the matters last mentioned, the court should pronounce a decree declaring the marriage to be dissolved: "Provided always, that the court shall not "be bound to pronounce such decree if it shall find that the petitioner has during "the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the "court, have been guilty of unreasonable delay in presenting or prosecuting such "petition, or of cruelty towards the other party to the marriage, or of having deserted

" or wilfully separated himself or herself from the other party before the adultery " complained of, and without reasonable excuse, or of such wilful neglect or " misconduct as has conduced to the adultery."

By sections 33 and 34, provisions were made for a husband claiming damages from an adulterous co-respondent, and obtaining costs from him.

By section 40, the court was given power to direct issues to be tried in any court of common law, and either before a judge of assize in any county, or at the sittings for the trial of causes in London or Middlesex, and either before a special or common jury. (But this procedure seems to have fallen into complete disuse, probably because it could not be conveniently worked, and more especially because of the disadvantage of trying issues before one judge, who was not one of the regular judges of the court, and concluding the cases before another.)

According to section 57, after a decree dissolving a marriage had become final, it was declared lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death; provided that no clergyman in Holy Orders of the United Church of England and Ireland should be compelled to solemnize the marriage of any person whose former marriage might have been dissolved on the ground of his or her adultery, or should be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person. But, according to section 58, when any minister of any church or chapel of the United Church of England and Ireland should refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in such church or chapel, such minister was to permit any other minister in Holy Orders of the said United Church, entitled to officiate within the diocese in which such church or chapel was situate, to perform such marriage service in such church or chapel.

The Amending Acts.

29. Several amending Acts have been passed, which contain numerous provisions as to the procedure, practice, and powers of the court, to some of which we may find it necessary to refer in dealing with the details of suggested amendments. For the present, it is sufficient to notice certain provisions in the Acts of 1860, 1866, 1868, 1873, and 1884.

By the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144, s. 7), decrees for divorce were not to be made absolute until after the expiration of not less than three months, and powers were given to any person during such period to intervene to show cause why the decree should not be made absolute, by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court, and, on cause being shown, the court was given power to deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry or otherwise, as justice might require, and special powers of intervention were conferred upon the King's Proctor in case, from information supplied as mentioned in the Statute or otherwise, he should suspect that the parties to the suit were, or had been, acting in collusion, for the purpose of obtaining a divorce contrary to the justice of the case. It may be here noticed that interventions, except by the King's Proctor, are extremely rare and may practically be left out of consideration; but intervention by the King's Proctor and the consequent recision of a decree nisi is not infrequent: this matter will be dealt with subsequently.

By the Matrimonial Causes Act, 1866 (29 Vict. c. 32, s. 3), a decree nisi for a divorce was not to be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the court should, under the power then vested in it, fix a shorter time.

It is not necessary to refer to all the sections of the Acts which deal with appeals, but it may be useful to notice that by section 4 of the Matrimonial Causes Act, 1868 (31 & 32 Vict. c. 77), in cases where, under this Act, there shall be no right of appeal, the parties respectively are to be at liberty to marry again at any time after the pronouncing of the decree absolute.

By the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31), the provisions aforesaid as to interventions were extended to suits for nullity of marriage.

The Matrimonial Causes Act of 1884 (47 & 48 Vict. c. 68), abolished the power of enforcing a decree for restitution of conjugal rights by attachment, but gave the court power to order, where the application was by the wife, such periodical payments to be made by her husband as might be just, and power to order the husband to secure such periodical payments; and where the application was by the husband, the court

was given power to order a settlement to be made of any property of the wife's for the benefit of the petitioner and the children of the marriage, or either or any of them, and to order such part as the court might think reasonable of any profits of trade or earnings, of which the wife was in receipt, to be periodically paid by her to the husband for his own benefit, or to him or any other person for the benefit of the children of the marriage, or either or any of them (sections 2, 3, and 4).

According to section 5, a respondent failing to comply with a decree of the court for restitution of conjugal rights was to be deemed guilty of desertion without reasonable cause, and a suit for judicial separation might be forthwith instituted, and a sentence of judicial separation might be pronounced, although the period of two years might not have elapsed since the failure to comply with the decree for restitution of conjugal rights. If the husband had been guilty of desertion, by failure to comply with such a decree, and of adultery, his wife might forthwith present a petition for dissolution of her marriage, and the court might pronounce a decree nisi for the dissolution thereof on the ground of adultery coupled with desertion, which decree should not be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the court should fix a shorter time.

30. Since the amalgamation of the courts under the Judicature Acts, the jurisdiction of the court for Divorce and Matrimonial Causes has been transferred to, and is exercised by, the High Court of Justice in the Probate, Divorce, and Admiralty Division, which consists of the president and one puisne judge.

31. It will be more convenient to refer to the Statutes, which confer powers upon the magistrates to deal with cases of separation between husband and wife in certain events, in a later part of the Report, when we come to consider more particularly that branch of our inquiry. It is sufficient here to notice that the Acts to which reference must be made are 58 & 59 Vict., c. 39 (the Summary Jurisdiction (Married Women) Act, 1895), and 2 Edw. VII., c. 28, s. 5 (the Licensing Act, 1902).

PART VI.

Laws of other Countries.

32. Having thus stated the position in England of the law and the courts which administer it, we consider it desirable, before proceeding to consider what alterations in this position should be made, to give a brief summary of the laws in force in other parts of the British Empire, in the principal European countries, and in the United States of America. We have had the provisions of these laws placed before us in the Parliamentary returns containing reports on the laws of marriage and divorce in foreign countries, No. 2, 1894 (C. 7392), No. 2, 1903 (Cd. 1468); and similar returns containing reports on the laws of marriage and divorce in the British self-governing Colonies, 1894 (H.C. 144, 145), (H.C. 323, 324), 1903 (Cd. 1785), and in the United States of America in a work produced in the United States and entitled "Special Reports of the Census Office on Marriage and Divorce," published in 1908 and 1909. In some instances we have had the advantage of hearing the evidence of persons experienced in the laws of the country to which they belong or with which they are familiar, notably, Lord Salvesen (one of the senators of the College of Justice in Scotland), The Right Hon. Ameer Ali (a member of the Judicial Committee of the Privy Council), Sir Richard Solomon (the High Commissioner for the Union of South Africa), the Hon. Mr. Justice Denniston (a judge of the Supreme Court of New Zealand), Professor the Hon. John Davidson Lawson (Dean of the Law School of the State of Missouri), Mr. Newton Crane and Mr. J. Arthur Barratt (members both of the Bar of the Supreme Court of the United States and of the English Bar), Dr. Neuhaus (formerly a German judge), Monsieur Mesnil (a French advocate), Dr. Bisschop (doctor of laws of the University of Leyden and a member of the Amsterdam Bar), Mr. A. W. Samuels, K.C., and Mr. James Roberts (from Ireland), and Mr. J. B. Lorimer, W.S. (from Scotland).

In the documents mentioned the laws are summarised, though some are more fully set out. The different summaries do not appear to be in complete accord. But we have not thought it necessary that the great expense of procuring full copies of the various enactments and of the attendance of witnesses to speak to them should be incurred. For the purposes of this report it seemed to us sufficient to present a summary from the materials before us which, while presented in a concise form, would convey, with sufficient (though perhaps not absolute) accuracy, a general view of the provisions of laws, other than those of England.

British Dominions.

Scotland.

In Scotland, after the Reformation, adultery was introduced as a cause for divorce vithout Statute, apparently upon scriptural grounds, and as a consequence of the abolition of the Pope's jurisdiction in Scotland. Prior to the Reformation, marriage had been looked upon in Scotland, as in other Roman Catholic countries, as a sacrament; after the Reformation, it came to be regarded from the point of view of a contract, of a peculiarly solemn and far-reaching nature, but which might be dissolved consistently with public morality, and divorce for adultery was at once introduced.

Wilful desertion was confirmed by Statute in the year 1573 as a ground of divorce, four years being then fixed as the period for which the desertion must subsist, and that period has been maintained until the present day. From the evidence of Lord Salvesen (Vol. I., p. 254) it appears that in 1908, 110 decrees for divorce were granted for adultery, of which 59 were at the instance of the husband, and 51 at the instance of the wife; and that, in the same year, 81 decrees for divorce were granted for desertion, of which 20 were at the instance of the husband, and 61 at the instance of the wife; and the statistics show that the number of divorce cases has, relatively to the population, continued about the same.

Ireland.

In Ireland, where the majority of the population are Roman Catholics, and where, apparently, conditions of life differ materially from those in this country, divorce *a vinculo* of parties there domiciled is obtainable (as in England before 1857), by private Acts of Parliament, after a divorce *a mensâ et thoro* has been granted by the King's Bench Division of the Irish High Court (which now exercises the powers of the older Ecclesiastical courts), and (if the suit be by the husband) after judgment has been obtained in an action in the Irish Courts for crim. con., the minimum expense of such proceedings being between 450*l.* and 500*l.* (Mr. Roberts, 42,603, 42,627.)

Since the passing of the Divorce and Matrimonial Causes Act, 1857, there have been 39 Irish Private Divorce Acts. (Mr. Roberts, 42,624.)

Isle of Man.

Divorce *a vinculo* can only be granted by Act of Tynwald, founded on a decree of judicial separation granted by the Chancery Division of the High Court of Justice in the Isle of Man, which, by the Ecclesiastical Civil Judicature Transfer Act, 1884, has jurisdiction in matrimonial matters, and follows the principles upon which the Ecclesiastical courts acted.

Channel Islands.

There appears to be no right to proceed to obtain judicially a divorce *a vinculo*, and we are not aware of any legislative proceedings with that object.

India.

The dissolution of marriage among the Christian communities in India, whether European, domiciled or country born (save that, in the Native States, the Act only applies to British subjects), is regulated by the provisions of Act IV. of 1869, usually called the Indian Divorce Act, under which decrees of divorce may be granted on grounds similar to those which exist at the present time in England, and where, since the marriage, a Christian husband has abandoned Christianity. Jurisdiction to grant any relief under the Act is confined to cases where (*a*) the petitioner professes the Christian religion; (*b*) resides in India at the time of presenting the petition; and (*c*) the marriage was solemnized in India. This latter restriction has been stated to inflict in numerous cases great hardship. We have some suggestions to make thereon, which will be found hereafter (p. 115).

We may note in passing that, by section 497 of the Indian Penal Code, adultery is made a criminal offence in the case of a man who, without the consent or connivance of the husband, has illicit intercourse with a woman, who is, and whom the man knows, or has reason to believe to be, the wife of another man. A note has been supplied by the India Office on this provision of the said code (*see* Appendix XXIII., pp. 153–4. *See also* the edition of the code published in 1909 by O'Kinealy and Caspersz, pp. 337–8).

Canada.

The British North America Act, 1867, by section 91, conferred upon the Parliament of Canada exclusive legislative authority in relation to marriage and divorce, but by section 129, all laws in force in the provinces of Canada, Nova Scotia, and New Brunswick were continued in such provinces respectively, and, by section 146, the provisions of the Act were extended to other provinces admitted to the Union. In the provinces of Nova Scotia, New Brunswick, Prince Edward's Island, and British Columbia, there existed at the time of the Union courts of divorce, and they still continue to exercise their functions. The grounds upon which decrees of divorce are granted in those provinces are as follows: In Prince Edward's Island and New Brunswick, adultery, impotence, or consanguinity, and, in Nova Scotia, the above grounds, and cruelty.

As to British Columbia, by Ordinance dated the 6th March 1867, jurisdiction to exercise all the relief and powers given under the English Divorce Act (20 & 21 Vict. c. 85), has been assumed by the Supreme Court of the province, but grave doubts have been entertained as to its right to do so.

There being no divorce courts in the remaining provinces of the Dominion—Ontario, Quebec, Manitoba, North-West Territories—recourse for relief must be had to the Parliament of Canada by private Act.

Union of South Africa.

(a) *Cape Province.*

According to Roman Dutch law, which is in force in that province, the grounds upon which divorce may be granted are adultery, malicious desertion, unnatural crime, perpetual imprisonment, long absence, and refusal of marital privileges, though it would appear that recourse is seldom, if ever, had to the latter four grounds.

(b) *Province of Natal.*

Divorce is granted on the ground of adultery or malicious desertion for not less than 18 months before the suit. These provisions, however, do not apply to the native tribes, which are governed under their own system of laws.

Newfoundland.

There is no law in force in Newfoundland relating to divorce.

New South Wales.

By the Matrimonial Causes Act, 1899 [Act No. 14, 1899], Part IV., ss. 12–16, divorce is granted, on the petition of a husband, for the adultery of the wife, and, on the petition of a wife, for the adultery of the husband, if the husband is domiciled in New South Wales when the suit is instituted, or such adultery is incestuous, or is coupled with (1) bigamy, &c., or (2) cruelty, or (3) desertion, without reasonable cause or excuse, for three years or upwards. In addition to the above, on the petition of either party, if domiciled in New South Wales for three years or upwards, divorce is granted for malicious desertion during three years or upwards; on the ground that the husband has, during three years, been a habitual drunkard, and has left his wife without means of support, or has been guilty of cruelty; on the ground that the wife has, during three years, been a habitual drunkard, and has neglected her domestic duties, or been unfit to discharge them; on the ground of imprisonment for three years under commuted sentence for a capital crime, or under sentence of seven years or upwards; on the ground of conviction for attempt to murder or inflicting grievous bodily harm; on the ground of the respondent repeatedly assaulting and cruelly beating the petitioner; on the ground that the husband has been in the last five years frequently convicted, has had sentences of three years in the aggregate, and has habitually left his wife without means of support.

New Zealand.

By the Divorce and Matrimonial Causes Act, 1908 (No. 50 of the consolidated statutes of New Zealand), on the petition of a party domiciled there for two years, the court may grant a decree of divorce for adultery, or for malicious desertion for five years, or on the ground that the respondent has been a habitual drunkard for four years, and has either habitually left his wife without means of support, or has been guilty of cruelty towards her; or the husband, being the petitioner, may obtain divorce, when his wife has, for a like period, been a habitual drunkard, and has habitually neglected her domestic duties and rendered herself unfit to discharge them. Whether the petitioner is husband or wife, divorce may be obtained in the event of sentence for seven years for an attempt on the life of the petitioner or child of the petitioner or respondent; or for the murder of the child of the petitioner or respondent; and further, on the ground that the respondent is a lunatic or person of unsound mind, and has been confined in an asylum or other institution or house in accordance with the provisions of the "Lunatics Act, 1908," for a period or periods not less in the aggregate than 10 years, within 12 years immediately preceding suit, and is unlikely to recover. Irrespective of a wife's rights, as above, the court may dissolve a marriage on the wife's petition on grounds similar to those prevailing in England at the present time.

Queensland.

By the Statutes of Queensland, Matrimonial Causes Jurisdiction Act of 1864 (28 Vict. c. 29), and Matrimonial Causes Act of 1875 (39 Vict. c. 13), the provisions of the Imperial Statutes (20 & 21 Vict. c. 85, 21 & 22 Vict. c. 93, 21 & 22 Vict. c. 108, and 22 & 23 Vict. c. 61), are re-enacted, so that the law is substantially the same as in England.

South Australia.

In South Australia, divorce is granted on the same grounds as in England, except that, in the case of adultery coupled with desertion in a wife's suit, one year's desertion is substituted for two years.

Tasmania.

The provisions of the Imperial Statutes (20 & 21 Vict. c. 85, 21 & 22 Vict. c. 108, 22 & 23 Vict. c. 61) have been made applicable by statute in Tasmania, so that the law is substantially the same as in England.

Victoria.

In Victoria, the petition may be presented and decree granted on the same grounds as those at present existing in England. In addition to the above, on the petition of a petitioner domiciled for two years in Victoria, a decree may be granted on the ground of desertion for three years; on the ground that the respondent husband has been a habitual drunkard for three years, and has left his wife without means of support, or has been guilty of cruelty; on the ground that the respondent wife has been a habitual drunkard for three years, and has neglected her domestic duties, or rendered herself unfit to discharge them; on the ground of imprisonment for three years, under commuted sentence for a capital crime, or under sentence of penal servitude for seven years or upwards; on the ground of a conviction within one year previously for attempt to murder the petitioner, or of having assaulted him or her with intent to inflict grievous bodily harm, or on the ground that the respondent has repeatedly during that period assaulted and cruelly beaten the petitioner; on the ground that the respondent husband has been, in the preceding five years, frequently convicted for crimes, and has been sentenced in the aggregate to imprisonment for three years, and has habitually left his wife without means of support; and on the ground that the respondent husband has been guilty of adultery in the conjugal residence, or coupled with circumstances or conduct of aggravation or of repeated acts of adultery.

Western Australia.

Until 1912 the divorce laws of this Colony, which were regulated by an Ordinance (27 Vict. No. 19), were similar in all respects to the laws of England, but Act No. 7 of 1912, which is to come into operation on a date to be fixed by Proclamation, contains material alterations in the law.

The causes upon which a decree may be granted, as enumerated in that Act, are adultery; malicious desertion for five years; on the ground that the respondent (husband) has been an habitual drunkard for four years, and has either habitually left his wife without means of support or has been guilty of cruelty towards her, or, the husband being the petitioner, that his wife for a like period has been an habitual drunkard, and has habitually neglected her domestic duties or rendered herself unfit to discharge them; on the ground of imprisonment for three years under commuted sentence for a capital crime or under sentence of seven years and upwards, or, the wife being petitioner, that the husband has been in the last five years frequently convicted, has had sentences of three years in the aggregate, and has habitually left his wife without means of support; on the ground of conviction for attempt to murder the petitioner or inflicting grievous bodily harm on him or her; further, on the ground that the respondent is a lunatic or person of unsound mind, has been confined in an asylum or other institution in accordance with the provisions of the Lunacy Act of 1903 for a period or periods not less in the aggregate than five years within six years immediately preceding the suit and is unlikely to recover.

FOREIGN COUNTRIES.

Austria.

In Austria, among Protestants, divorce may be granted on the ground of adultery, malicious desertion, condemnation for crime, immoral habits, infectious diseases, ill-treatment, threats or serious vexations, unconquerable aversion; and among the Jews, on the ground of mutual consent, or the adultery of the wife.

Belgium.

In Belgium, divorce is granted on the following grounds, namely, the adultery of the wife, the adultery of the husband, if he shall have kept his mistress in the common residence, violence endangering life (excès), cruelty (sévices), grave indignities (injures graves), sentence of one of the parties to an infamous punishment involving loss of civil rights, mutual and unwavering consent of the parties expressed in manner prescribed by law.

Bulgaria.

By the law of the orthodox Greek Church, and therefore of Bulgaria, divorce *a vinculo* only is recognized. It may be granted on the grounds of adultery, cruelty, threat or designs against the life of the other party to the marriage, absence of the husband for four years if his whereabouts are unknown, or if his whereabouts are known, without sending his wife means of support; impotence; insanity, epilepsy, idiocy, or syphilis supervening after marriage and incurable; sentence to severe or degrading punishment for theft, fraud, embezzlement or homicide; unsubstantiated charge of adultery made by one party to the marriage against the other; unnatural crime of the husband upon his wife; restraint on religious liberty, drunkenness, when accompanied by squandering property and destroying the home, or an otherwise disorderly or dissolute manner of life; abandonment of the husband by the wife, driving him from his home without sufficient grounds followed by refusal for three years to live with him again.

Denmark.

In Denmark judicial divorces are obtainable on the grounds of adultery, bigamy, desertion (if malicious, after three years, if simple, *i.e.*, absence without known or apparent cause, after seven years), absence for five years where the presumption is that the absentee is dead, imprisonment for life. In addition to the above, administrative divorces may be obtained on the grounds of insanity, separation for three years, sentence for three years' penal servitude.

France.

In France, divorce, which had been introduced for the first time in 1792, but had been abolished at the Restoration in 1816, resumed its place in the Civil Code in 1884. The grounds upon which it is now permitted are adultery, violence endangering life (excès), cruelty (sévices), grave indignities (injures graves), (a cause of which it is, we are informed, extremely difficult to give an exact classification), condemnation of either spouse to an afflictive or degrading punishment.

Germany.

By the German Civil Code of 1900, all the previous laws of the Federal States have been abolished, and the absolute grounds upon which decrees for divorce are now granted throughout the German Empire are adultery, bigamy, crime against nature, attempt on the life of the other party to the marriage, malicious desertion for one year, insanity of three years duration after the marriage, destroying intellectual communion between parties, and holding out no hope of recovery. The court has a discretion to grant divorce on the ground of serious breach of conjugal duties, and dishonourable or immoral conduct, under which all vices and bad habits may furnish a sufficient ground that the above-mentioned criterions apply, and that continuation of cohabitation cannot reasonably be expected.

Greece.

Divorce in Greece is regulated by the Roman and Byzantine laws, in accordance with the provisions contained in the collection of Harmenopoulos. The grounds for divorce are established in No. 117 of the Novellae Constitutiones of Justinian (with some unimportant amendments) and are, on the petition of the husband, adultery; that the wife has attempted the life of her husband, or, being aware of plots against it, has not disclosed them to him; non-disclosure to her husband of knowledge of a conspiracy against the sovereign; without her husband's consent, staying the night at another house, except the house of her parents; without her husband's consent attending races, theatres, or sports; against her husband's wish attending dinners or bathing in the company of men; procuring abortion. On a wife's petition, the grounds are, that the husband entertained schemes against the sovereign, or, being aware of such, has not denounced them to the authorities; that the husband has attempted the life of his wife, or, being aware of plots against it, has not disclosed them to her, or undertaken to prosecute the authors of them; that he has endeavoured to procure her to commit adultery; that he has brought a false accusation of adultery against her; adultery in the conjugal home; adultery in the same town, if persisted in; impotence of husband, existing before marriage and continuing at least three years after it.

Hungary.

Prior to 1894, each religious denomination was governed by separate regulations, but in that year, marriage and divorce in Hungary and Transylvania were regulated by the Civil Marriage Bill of that year which came into force in 1895 and the absolute grounds upon which divorce is permitted, without distinction of creeds, are adultery; unnatural crimes; bigamy; desertion; attempt upon life or serious maltreatment endangering safety or health; sentence of death or penal servitude or imprisonment for five years. The discretionary grounds are violation of marital obligations, other than above; inducing or attempting to induce a child of the family to a criminal act or immoral life; the respondent persisting in leading an immoral life.

Italy.

No divorce is permitted.

The Netherlands.

Adultery and malicious desertion appear to have been grounds for divorce under the Roman Dutch Law. In addition to those causes, imprisonment for four years; grave injuries or ill-treatment endangering life; a lapse of five years after a judicial separation (by consent or otherwise) without reconciliation, are now grounds for divorce in The Netherlands.

Norway.

The Norwegian Act of the 20th August 1909 has effected radical changes in the law. We have obtained a copy of that law, which, with a letter from Höiesterets-assessor Bull explanatory thereof, will be found in Appendix V., pp. 43–5. From those materials it would appear that either party to a marriage is entitled to a divorce, where, at the time of marriage, the other spouse, without the knowledge of the former, has suffered from a physical defect making him or her unsuited for marriage, or from epilepsy or leprosy, or from a venereal disease in an infectious form, or from insanity; or (the husband being petitioner) when the wife has been made pregnant by someone other than the husband; where either party has been guilty of such crimes as are dealt with in the General Criminal Code, namely, the contracting and transmitting, or exposing any others to an infectious sexual disease, which has been contracted in consequence of immoral conduct (section 155, subsection (1)), a serious offence against decency, such as rape and the like, immoral conduct with a child below 16 years, or with the ward of the party, incest, unnatural offences, &c., (sections 191–199, 202–208, 213), adultery (section 209), bigamy (section 220); or such crimes as are dealt with in the Criminal Code, sections 216, 217, 223 to 225, (abduction of children and minors from the care of their parents or guardians), if the crime has been committed with indecent intent; or a crime involving bodily injury of the other spouse, or of any other deliberate crime by which the other spouse suffers injury in body or in health (section 229); or cruelty to children, or exposing them to conditions which are clearly dangerous to their morals (section 380); sentence of loss of liberty for three years or upwards; sentence to hard labour or confinement in an inebriate home for repeated acts of vagrancy or drunkenness; refusal of conjugal rights for two years; insanity for three years with no reasonable prospect of recovery; where a separation has been in existence for two years after formal decree, or for one year after such decree, if both parties assent to its becoming a decree of divorce; where there has been a separation for three years without decree, and no conjugal relations during that time.

Portugal.

Prior to 1910, there was no law of divorce in Portugal. By the law of the 4th November of that year, with a copy of which, as set out in Appendix XXII., pp. 152–3, we have been supplied by the Foreign Secretary, divorce for a number of causes has been instituted.

By Article 4 of that law, those causes are—1, adultery; 2, conviction of one of the major crimes specified in Articles 55 and 57 of the Penal Code; 3, illtreatment; 4, abandonment of home for not less than three years; 5, absence for not less than four years, during which the absentee gives no tidings of himself or herself; 6, incurable lunacy, three years after the date on which insanity has been declared by the competent authorities; 7, separation *de facto* by mutual consent for 10 years; 8, inveterate gambling habits; 9, incurable contagious disease, or any disease which induces sexual aberration.

Further, by Article 34, the non-success of a suit for divorce instituted for causes 1, 2, 3, 4, 8, 9, aforesaid, affords sufficient cause for the respondent in such previous actions petitioning for a divorce.

Sections 35 to 40 permit divorce by mutual consent, subject to the provisions laid down in those sections.

Roumania.

In accordance with the laws of the orthodox Greek Church, only divorce *a vinculo* is recognised, the grounds for which it may be granted being adultery; injuries or illtreatment; sentence to imprisonment; attempt on the life of the other party to the marriage, or failure to warn such party of such attempt, when made by a third party. Divorce may also be obtained by mutual consent, subject to various formalities.

Russia.

In Russia, the ordinances of each church embodied in the General Code of Laws lay down the grounds upon which divorce is to be granted.

For the members of the Russian Church, and for "the Old Believers," the grounds upon which decrees of divorce may be made are adultery; bigamy; impotence existing at marriage; the absence of the respondent for five years without news; sentence of a court of law, under which one of the parties to a marriage is condemned to loss of civil rights involving deportation; the entrance of both parties into a religious order, in cases where there are no children needing parental care; the conversion of a non-christian spouse to the Russian Church, provided such party or the other party to the marriage desires the dissolution of it. Members of the Lutheran Church (other than those resident in Finland for whom the grounds of divorce appear to be adultery, illicit intercourse with a third party after betrothal, and malicious desertion for at least one year), may seek divorce in their consistorial courts on the grounds of adultery; concealed loss of virginity of the wife before marriage; attempt to poison; five years desertion; impotence and repugnance to marital intercourse; refusal to fulfil conjugal duties; incurable infectious disease; madness; depravity of life; cruelty and offensive treatment; attempts by one party to bring dishonour on the other or deprive him (or her) of his (or her) freedom, office, or occupation; unnatural propensities; grave crimes involving sentence of death or a punishment in substitution; penal exile.

Among the Jews, divorces are granted by the Rabbi. The marriage may be dissolved by mutual consent, or on grounds based on Mosaic law.

Mahommedan marriages are dissolvable by mollahs, but we have no information as to the grounds upon which they are dissolved.

The law of Poland is regulated by a decree of the Emperor of 1836, under which there are separate regulations for the members of the Roman Catholic, the Greek Orthodox, the Greek Unified and Protestant Churches, for members of denominations other than the above, and for cases where the religion of the parties to the marriage is different.

Spain.

No divorce is permitted.

Sweden.

The grounds for judicial divorces are adultery; illicit intercourse of either party with a third party after betrothal, or the intercourse of the wife with a third party before betrothal; malicious desertion for one year, provided the absentee has left the kingdom; absence without news for six years; or attempt by one party to the marriage on the life of the other; on the ground that either party is suffering from bodily incapacity, or has concealed the fact of being affected with an incurable contagious disease; sentence of life imprisonment; insanity of three years' duration which is pronounced incurable.

Divorce may also be obtained by direct appeal to the King's Royal Prerogative, where one party has been condemned to death or civil death; or condemned for a gross offence, or one involving temporary loss of civil rights; where one party has been imprisoned for at least two years; on the ground of prodigality, drunkenness, or violent disposition; or irreconcilable aversion and hate, which has lasted after one year's separation *a mensâ et thoro*.

Switzerland.

Prior to January 1st, 1876, the different cantons of Switzerland had individual laws regulating divorce, but after that date the matter was regulated by a federal law throughout the country and is now regulated by the Code Civil of the 10th of December, 1907, which made but little change in the law then existing. The grounds laid down by that Code are adultery; attempt by one party on the life of the other; cruelty (sévices); grave indignities (injures graves); the commission of an infamous crime by one party, or base conduct by one party rendering married life intolerable; malicious desertion for two years; insanity rendering married life unbearable, and which, after three years' duration, is pronounced incurable; conduct rendering married life unbearable.

United States of America.

So far, in dealing with the laws of the various colonies and foreign countries, we have merely set out those laws themselves in a short form and without comment, but in dealing with the United States, to which country frequent reference has been made during the course of this inquiry, we think it desirable, before dealing with the laws themselves, to mention briefly some of the points which have been brought to our attention.

For details we may refer to the evidence presented before us, after careful preparation, by Mr. R. Newton Crane, a member of the Federal Bar of the United States and also a member of the English Bar, one of the legal advisers to the Embassy of the United States in this country; by Mr. J. Arthur Barratt, a member of the United States Supreme Court Bar, of the New York Bar, member of the Council of the International Law Association and of its Committee on Divorce Jurisdiction, one of the legal advisers to the Embassy of the United States in this country; and by Professor J. D. Lawson, member of the State and Federal Bars, formerly President of the Bar Association of Missouri, Dean of the Law School of the State of Missouri, editor of the "American Law Review," Special Commissioner from the American Institute of Criminal Law and Criminology, the American Bar Association, and United States Government. The evidence of these witnesses will be found at Questions 16,306–16,548; 16,549–16,885; 23,773–23,956 respectively. In Appendix XII. A. and B. will also be found the replies obtained by Mr. Barratt to questions addressed by him to legal aid societies in various states of the United States and to American jurists, which contain a large amount of valuable information.

It is commonly asserted that the statistics as to divorce in the United States show that the number of dissolutions of marriage relatively to the number of marriages is exceptionally large, that it is possible there to obtain divorce for trivial causes, and that the facilities which exist of obtaining divorce are such as to be prejudicial to the moral and social interests of the community.

As to the question of statistics, it appears from the evidence of Sir John Macdonell that the highest divorce rate and the greatest increase amongst civilised countries, Japan excepted, are in the United States; the statistics available appear to show that the number of dissolutions was, at the time of the collection of the statistics, in the proportion of about 1 to 12 or 15 marriages. It has, however, been pointed out to us by Mr. J. Arthur Barratt that reliance cannot be placed on the figures, owing to the fact that, though the information with reference to the number of divorces rests on reliable bases, statistics as to the number of marriages are most uncertain. Figures as to marriages can only be got from States where marriages are registered, and up to 1906, in only 25 States of the Union, out of the whole number of 50 States, were there provisions of law for the State registration of marriage (16,606); and in only eight States is there at the present time anything like a complete return of marriage statistics (16,754). In the case of immigrants who settle in the United States in such numbers, a large proportion were married in their native countries, and these marriages are not registered in the United States (16,608–9). Amongst these immigrants it is fairly certain that the percentages of divorce are high; and therefore, though it may be true in a sense that the proportion above referred to is the proportion of divorces to registered marriages, it is not in fact a true proportion to the total number of marriages in the United States. It should also be observed that the census reports of the United States include judicial separations and nullity suits under the head of "Divorce," thus largely adding to the statistics of divorce questions which do not come properly under the head of divorces *a vinculo* (16,670–1).

It is further asserted that what has been described as "secret migration from "State to State in search of easy laws" has materially tended to increase the number of divorces. On this point, it is to be noted that, by the Constitution of the United States, Congress has no power to legislate upon divorce, and, therefore, no federal statute can be passed without an amendment to the Constitution, a difficult proceeding, since to do so requires the consent of three-fourths of all States of the Union. It, therefore, follows that each State legislates for itself in the matter, and this necessarily results in lack of uniformity in the laws existing in the various States. Owing to this lack of uniformity, to laxity of procedure in some parts of the country, to the difference which exists with reference to the duration of domicil or residence necessary to confer on the courts jurisdiction in these proceedings, to the doctrine which we are informed is clearly established in American law that a wife is permitted to acquire a separate domicil from that of her husband, when her

husband has been guilty of a matrimonial offence entitling her to a divorce, and to Article 4, section 1, of the United States Constitution (which provides that "full faith " and credit shall be given in each State to the public acts, records, and judicial " proceedings of every other State,") it is no doubt possible for an inhabitant of one State to go into another State, and, by misuse or fraudulent use of the laws and procedure of that other State, to obtain a decree of divorce for a cause, which occurred while the parties were residing outside the latter State, or for a cause which was not a ground of divorce under the laws of the former State.

This question received consideration from the Divorce Congress held at Washington in February 1906 and at Philadelphia in November of that year, and it seems that its effects have been overestimated. This is the view entertained by Professor Howard (16,592), and assented to by Mr. Barratt.

It is further alleged, as above stated, that divorce is granted in America for trivial causes. As to this Mr. Barratt points out (16,625) that nearly every cause which is permitted in the United States is permitted by the law of some state in continental Europe.

The witnesses differ as to whether the number of causes has a relation statistically to the number of divorces. Mr. Barratt maintains it has none (16,625–9); but this is not the view taken by Mr. R. Newton Crane (16,446–7).

Mr. Barratt points out that, whatever the reason for increase or decrease in percentages may be, such increase or decrease cannot be accounted for by the number of statutory causes for divorce. He refers to the statistics of various States, and shows that, whereas in some States with numerous causes the increase has been slight, or there has been even a decrease, as in Connecticut, in other States, having few causes, the increase has been considerably greater, as, for instance, in New York, where adultery is the only cause (16,625–7). (*See also* evidence of Professor Lawson, 23,857, 23,882–3, 23,910.)

Considering this matter generally, it seems that there are so many factors to be taken into consideration in the United States, that it is not possible to argue by analogy that what may, or is alleged to be, the condition in that country would become so here, if further facilities for divorce were granted. It may well be that the increase in the percentages of divorce in the United States is due to conditions which do not apply in this country, as, for instance, the ease with which marriage can be entered into (Mr. Newton Crane, 16,365–16,371), and immigration (Mr. Barratt, 16,681). There can be no doubt that people, coming from countries or places where the standard of marital conduct may be lower than in the United States, when they find that other standards are there expected, and that the laws of the United States afford relief for the violation of those standards, avail themselves of the remedies which those laws afford (16,699 *et seq.*). It does not seem to be established that the unsettling of family life, which is alleged to exist in some parts of the United States among certain classes of society, is due to any substantial extent, if at all, to the operation of the divorce laws; facilities of travel, increase of luxury, a growing spirit of independence, a resentment of restraint, must all be taken into account; and it may even be suggested that the increase of divorce (an increase which would appear from statistics to be taking place in other countries where there is no suggestion that the sexual and general morality of the country is low), is attributable in many cases to an appreciation of a higher standard which is required, and rightly required, in such matters (16,700–8).

The two witnesses last referred to maintain that the standard of sexual morality in the United States is as high as, or even higher than, it is in England (Mr. Newton Crane, 16,445, 16,543; Mr. Barratt, 16,680). The cause, which heads the list of the numbers of cases due to particular causes, is desertion, the period for which varies in the different States. But it must always be kept in view that in many, if not most, desertion cases adultery also exists, and, in a certain number, the marriage has been in fact already dissolved by death.

As to the grounds, which exist in the various States and Territories of the Union (with the exception of South Carolina) upon which divorce may be granted, we have set out in Appendix XIII. a summary of these, extracted from the United States Census Report, previously referred to, containing a list of the causes which are permitted, and the States in which those several causes are permitted. We think it sufficient here to say that the causes vary from that of adultery, which is the sole cause in the State of New York, to "causes deemed sufficient by the court" in the State of Washington, and that the causes which are permitted in the preponderating number of States are adultery, desertion, cruelty, and conviction and

imprisonment for crime. The first of these causes is permitted, so far as we can ascertain, in all the States and Territories of the Union, with the exception of South Carolina, by the constitution of which State divorces from bonds of matrimony are not allowed. Desertion is a cause for divorce in all the States with the exception of four, namely: New York, the District of Columbia, and the States of North and South Carolina. Extreme cruelty, by which we understand such cruelty, on the part of either husband or wife, as to endanger the life or health of the other party or to render cohabitation unsafe, is admitted as a ground for divorce in 36 States and Territories, and imprisonment in 41. (*See* Appendix XIII., pp. 120, 121.)

As to the courts which administer divorce jurisdiction in the United States, it appears from the evidence of Mr. Barratt (16,706) that this jurisdiction is exercised by the Supreme or Superior Courts for each State, and there is such a court usually sitting in each county of every State, though in some of the less thickly populated parts a judge may sit for more than one county. Litigants thus have the same facilities for bringing actions for divorce, as they have in the Supreme or Superior Courts for bringing any civil action.

In conclusion, it is to be noticed that all questions connected with the law of divorce, its administration and the effects of it in the United States, were very fully considered in 1906 by the National Congress on Uniform Divorce Laws. As a result of their deliberations, a uniform law has been proposed by which provision is made by section 21 of the "Model" Act (fully set out on page 272 of the said Census Report and copied in full in Appendix XXVII., p. 189), for compliance with the "full faith and credit" clause, after the regulations contained in sections 7 to 10 of the "Model" Act have been complied with, but subject to the proviso at the end of section 21—

> "That, if any inhabitant of this State shall go into another State, territory, or country in order to obtain a decree of divorce for a cause which occurred while the parties reside in this State, or for a cause which is not ground for divorce under the laws of this State, a decree so obtained shall be of no force or effect in this State."

By section 3 of this "Model" Act, the causes agreed upon by the National Congress on Uniform Divorce Laws as being sufficient to afford grounds for granting divorce are adultery; bigamy; conviction and sentence for crime, followed by continuous imprisonment for at least two years, or in the case of an indeterminate sentence, for at least one year; extreme cruelty, on the part of either husband or wife, such as to endanger the life or health of the other party or to render cohabitation unsafe; wilful desertion for two years; and habitual drunkenness for two years. Some of the States of the Union have already adopted the "Model" law.

Courts of other Countries.

33. We have thus shortly set out the provisions of the laws of Scotland and Ireland, the principal British Colonies, numerous foreign countries, and of the United States. We have not thought it necessary to investigate the question of the courts by which these laws are administered in all those countries, but we have had before us witnesses who have given us information on this matter from Scotland, Germany, France, and The Netherlands, and it may here be useful to summarise the information we have received.

In Scotland, divorce cases are heard in Edinburgh by certain judges of the Supreme Court, sitting without juries. These judges, before any one of whom a case may be brought, are five in number. The Scottish system for enabling poor litigants to prosecute their cases and maintain their defences will be mentioned hereafter (p. 130).

From the evidence of Dr. Carl Neuhaus, it appears that in Germany divorce petitions are filed in the county courts (Landgericht), composed of three judges, whose jurisdiction is unlimited, that there are nearly 200 of these courts (42,913), that each court is established for a district of about 250,000 inhabitants, and that the districts are mostly of such an area that a party, in order to arrive at a court, has not to travel more than about 30 miles. (42,813-7.)

In addition, however, to the easy access to courts which is thus afforded, poor litigants in Germany are assisted in bringing their cases before a tribunal by the poor law (Armenrecht) by which the right of free legal assistance is granted to every plaintiff or defendant, who produces a certificate of the local police that he is not in a position to pay the fees of the court, and satisfies the court that the proceeding is *bonâ fide*, and that there is a *primâ facie* case. The poor litigant is not compelled

to pay court or lawyer's fees, or the expense of bringing his or her witnesses or of copying documents, and obtains the free service of a lawyer. In the event of success and the defendant having means, the pauper plaintiff is entitled to recover his or her costs from the defendant.

In France, every tribunal d'arrondissement, a court composed of three judges, has full jurisdiction, which includes jurisdiction in divorce. There are 375 such courts. In addition, there is a system in force called the "assistance judiciaire" by which poor people can conduct their cases with no expense. The "assistance judiciaire" is largely used in divorce cases, as will be seen from the tables for the years 1907, 1908, and 1909, supplied to us by Monsieur Mesnil, from which it appears that, in the year 1907, 9,599 applications for "assistance judiciaire" in such cases were made, of which 3,952 were granted, the result of the cases being that the person assisted was successful in 2,628 cases. In 1908, 9,687 applications for "assistance judiciaire" in divorce cases were made, of which 4,204 were granted, the result of the cases being that the person assisted was successful in 2,760 cases. In 1909, 9,807 applications for "assistance judiciaire" in divorce cases were made, of which 4,390 were granted, the result of the cases being that the person assisted was successful in 2,777 cases. The provisions as to "assistance judiciaire," with the statistics above referred to, are given in full in Monsieur Mesnil's evidence (Vol. III. pp. 485–6).

In The Netherlands, there are 23 local courts having exclusive high court jurisdiction in their districts, from which an appeal lies to the courts of appeal, of which there are five. These 23 courts have jurisdiction in divorce in cases where the petitioner is domiciled in the district of the court (43,225). A system of procedure *in formâ pauperis* exists, of which, from the statistics supplied to us by Dr. Bisschop, Appendix XIX., pp. 148–9, considerable use seems to be made.

It will thus be seen that in these countries very much greater facility is afforded to poor litigants for having their matrimonial disputes tried, both by reason of the ease of access to the court and the system of legal assistance, than exists in this country.

Noticeable Points.

34. Without making a detailed comparison under the numerous points which arise, certain striking features are to be noticed from the foregoing statement of the English and other laws, viz.:—

(1) That the whole administration in this country of the laws relating to divorce and other matrimonial causes (except under the Summary Jurisdiction Acts) is concentrated in London, although there are large numbers of the population resident in districts far remote from London.

(2) That in England and some of the British Colonies, which allow dissolution of marriage, there is a difference made between the sexes, whereas in Scotland and most of the other countries mentioned, and in New Zealand and New South Wales, Cape Province and Natal, no distinction is made between the position of a man and a woman, though the two first-named Colonies appear to require compliance with certain provisions as to domicil.

(3) That, while in England adultery is the only ground of divorce (coupled, in the case of a suit by a wife, with certain other aggravating circumstances), in almost all other countries, which permit of divorce *a vinculo*, other grounds are admitted.

PART VII.

Questions.

35. Having given a short account of the present state of the English law, of how that law arose, and of the laws of most other civilised countries, we now proceed to state the questions which seem to us to arise for consideration.

Those questions may be stated as follows:—

(I) **Should any, and, if any, what courts have jurisdiction to hear and determine divorce and other matrimonial causes, at any, and, if any, at what places, in addition to the High Court sitting in London?**

(II) **What should be the extent of such jurisdiction, and what procedure should be adopted?**

(III) **Should any, and, if any, what alterations be made with regard to the exercise of the jurisdiction conferred by the Summary Jurisdiction (Married Women) Act, 1895, and the provisions of the Licensing Act, 1902, relating to separations in cases of habitual drunkenness?**

(IV) **Are any, and, if any, what amendments of the said Acts of 1895 and 1902, and of the procedure and practice thereunder desirable?**

(V) **Should the law be amended, so as to place the two sexes on an equal footing, as regards the grounds upon which divorce may be obtained?**

(VI) **Should the law be amended so as to permit of divorce being obtained on any, and, if any, what grounds, other than those at present allowed?**

(VII) **Are any other, and if any other, what amendments needed in the law, procedure and practice relating to divorce, nullity of marriage, and other matrimonial questions?**

(VIII) **Should any, and, if any, what provisions be made for preventing or limiting the publication of reports of divorce and other matrimonial cases?**

36. It will be observed that the first four questions are concerned with the administration of the law, though they may in some respects involve amendments of the existing law, while the next three deal mainly with alterations in the existing law, and only incidentally with improvements in the present procedure and practice. The last question may be regarded separately.

We have considered the questions with the anxious desire that any recommendations we might make should be of a nature to strengthen, and not to weaken, the national character, to promote the highest possible standard of morality for both sexes and of regard for marriage and family life, and the best interests of society and the State; and that they should provide for the administration of justice in matters with which the inquiry is concerned, in such a way that adequate means should be available for all classes of the community to bring their cases before courts of justice.

37. It will be convenient to make particular observations about the matters involved in each question, when we come to deal with the questions separately, but it seems necessary to indicate, as a preliminary, the views which we entertain as to the principles to be adopted by the Legislature with regard to divorce.

PART VIII.

Consideration of the Basis of the Report.

38. Throughout the evidence given before us we have found no general objection to the consideration of all the above questions, though individual witnesses object to certain of the suggestions which have been made to us, and vary in their views as to the best way of dealing with the different points involved. Although a few of the witnesses, who appeared before us, would like to see the Act of 1857 repealed on religious grounds (and the question of such repeal was open for our consideration), they obviously felt that such a course was not practicable, and the suggestion that the Legislature should now consider marriages absolutely indissoluble may, in our view, be dismissed from consideration. But some of these witnesses, who object to divorce altogether, have frankly faced the view above expressed, and have put forward objections to any extension of the grounds of divorce, and to any facilities for putting the law in force being given beyond those which are at present afforded,

though some of them seemed to feel that whatever the law is, it should not be left unavailable to those who need it, for want of means to enforce it.

39. The main ground urged by those who objected to any extension of the grounds for divorce proceedings was that such extension would be contrary to Christian principles. This subject is discussed in all its bearings in the Chairman's notes above referred to, and in many parts of the evidence, but in our opinion it does not seem desirable that this Commission should attempt to express any definite opinion as to what are the true Christian principles applicable to this subject. Opinions of persons equally learned, equally able, equally pious and honest, equally disinterested and humane, and equally public spirited, have differed and still differ upon the point, although the original materials upon which the differing opinions are formed are of a limited character. From these original materials has grown up an immense literature, which embraces the writing and opinions of early Fathers of the Christian churches, the provisions of ecclesiastical councils, decrees of emperors and popes, penitentials for the guidance of priests, canons of the churches, and writings of theologians and jurists. These productions were necessarily affected by the state of belief and knowledge, which existed at the respective times of their issue, and it seems to us that some of the conceptions on which they are based may fairly be reconsidered in modern times.

We do not propose to attempt the task of giving any summary of these writings and documents nor of the opinions and conceptions to be found in them. They have been extensively examined and discussed in the works of various well-known authors. Broadly speaking, the differing opinions have resulted in the acceptance by Roman Catholics of the doctrine of the indissolubility of marriage (although, as previously indicated, practical relief was afforded by the application of the doctrine of nullity), while Protestant communities have generally treated the tie as dissoluble but have differed as to the grounds upon which it might be dissolved.

40. We think, however, that it is important that we should state the views of theologians and scholars who have been called before us, in order to assist in arriving at a conclusion as to the attitude which should be adopted by the State.

For a full appreciation of this evidence, which was given with much learning and in much detail, we must refer to the Minutes of Evidence, but we think it will be convenient to give a brief summary of what we conceive to be the points of principle stated by each of these important witnesses in relation to the main question of dissolubility.

It will be observed that, upon this main question, there are wide differences of opinion. In the evidence given before us, opinions were maintained in favour of each of the following principles:—

That all marriages are indissoluble.

That Christian marriages are indissoluble.

That marriage is dissoluble on the ground of adultery only.

That marriage is dissoluble on the grounds of (1) adultery, or (2) desertion.

That marriage is dissoluble on other serious grounds based upon the necessities of human life.

The Right Rev. the Bishop of Birmingham, Dr. Gore (now Bishop of Oxford) (Vol. II., 21,238–21,728),

Considers that consummated marriages should be treated as indissoluble in the Church (21,243), but this proposition is limited to Christian marriages, though, *primâ facie*, all marriages entered into in England not specifically Jewish should be treated as Christian (21,505). This view is different from that previously stated in the first edition of his book on the "Sermon on the Mount," in which he expresses the opinion that the exception contained in chapters V. and XIX. of St. Matthew's Gospel does not prohibit the remarriage of an innocent man who has put away his wife for adultery (21,569, 21,576, 21,589).

Rev. Herbert Hensley Henson, Canon of Westminster and Rector of St. Margaret's, Westminster (Vol. II., 22,511–22,913),

Considers that the conditions of divorce are properly to be determined in the light of Christian principle, with reference to the actual necessities and circumstances of men, and that Christ's words in St. Matthew and St. Mark are not legislative (22,579–22,587, 22,606–22,608*a*, 22,715–6, 22,808–22,814).

Monseigneur Moyes, Canon of the Arch-diocese of Westminster and Prelate of the Roman Court (Vol. II., 22,914–23,051),

Considers that a Christian marriage, that is one in which the parties are baptized Christians (22,942–3), which has been consummated (22,940), being a sacrament in which the union of the parties is wrought and ratified by God (22,921, 23,038), has a paramount and immutable character of Divine law, and is absolutely indissoluble, except by the death of either party (22,921).

The Right Rev. the Bishop of Ely, Dr. Chase (Vol. II., 23,052–23,194),

Considers that according to the three earliest witnesses—St. Mark, St. Luke's version of "Q," and St. Paul (the earliest of all)—Christ taught the absolute indissolubility of marriage which is a strong argument for the conclusion that Christ taught that marriage cannot be dissolved for any reason, but that St. Matthew did represent Christ as allowing an exception. He is of opinion that, while much remains uncertain as to the teaching of Christ as to divorce, there is one conclusion absolutely beyond doubt, namely, that there is no version of Christ's teaching and no interpretation of any version of Christ's teaching which does not forbid divorce except on the one and only ground of adultery (23,093, Vol. II., p. 436, 23,175–7).

Rev. W. P. Paterson, D.D., Professor of Divinity in the University of Edinburgh and a Minister of the Church of Scotland (Vol. II., 23,195–23,385),

Considers that the extension of the scope of divorce beyond the specific case of adultery is justified on the ground that, while the ideal which Christ set up is binding upon members of His Kingdom, it ought not to be imposed by force upon a mixed society, including many who are non-Christian or only nominally Christian (23,245), and that the duty of the State in relation to the dissolution of marriage is not to make the Christian ideal compulsory, but to make provision for the relief of those who suffer injustice in marriage, in so far as this shall be compatible with the general interests of society (23,245), and he gives as instances of such grave injustice, malicious desertion, and habitual drunkenness or criminality, and he recognises no distinction between a Christian marriage and a non-Christian marriage in its possible dissolubility (23,268). He would justify divorce when the situation was intolerable from the above causes (23,303, 23,315).

Rev. William Sanday, D.D., Lady Margaret Professor of Divinity at Oxford, a Canon of Christchurch (Vol. III., 38,476–38,671),

Considers that Our Lord's words, however reported, express a moral ideal rather than a positive rule (38,511, 38,556), and that they did not exclude the possibility of exceptions (38,517, 38,520, 38,575, 38,581), that the one exception stated in the New Testament need not be treated as necessarily excluding all others (38,580–1), that the recognition by Christians of a lofty and unqualified moral ideal does not of necessity prevent a Christian State from legislating (as it were) upon a lower level (38,499), and that in determining what other exceptions may legitimately be made to Our Lord's ideal, there is room for a statesman at the present day to consider what is best in the interests of the higher expediency (38,582, 38,670, 38,671).

Rev. William Ralph Inge, D.D., Lady Margaret Professor of Divinity at Cambridge (now Dean of St. Paul's) (Vol. III., 38,672–38,776),

Considers that the doctrine that marriage is absolutely indissoluble cannot be proved from the New Testament, and that Our Lord's prohibition of divorce was absolute in form rather than intention (Vol. III., pp. 256–258). He considers that the duty of a Christian State is to legislate with due regard for the imperfections of human nature, while at the same time recognising the imperative obligation to maintain the unique sanctity of the marriage contract which Christ unquestionably intended to emphasize in the strongest manner (*ib.*, p. 259) (38,774–776), and he does not see why the State should not assume the power of dispensation in a few cases besides adultery, the instances of such cases which he gives being brutal cruelty,

habitual drunkenness, conviction of a felony, and desertion (38,702–38,705) (*ib.*, pp. 256–60). He thinks that the State might permit of divorce being granted on the serious grounds he mentions, and still be acting in accordance with Christian principles (38,774–6).

Rev. James Denney, D.D., Professor of New Testament Theology in the United Free Church College of Glasgow (Vol. III., 38,777–38,989),

Considers that nothing in the law should tend to disparage the Christian ideal of marriage as the permanent union of husband and wife, with a view to family life, a union which is recognised by society and which is the nursery both of Church and State, but that the law has to take account of facts by which in certain cases marriage is unquestionably destroyed, and that, for dealing with those facts, Scripture gives us no authoritative guidance. It neither prescribes nor precludes the remedy of divorce, and of a new marriage, in dealing with any or all of them (*ib.*, p. 265) (38,789, 38,838, 38,913, 38,948).

Rev. J. P. Whitney, Professor of Ecclesiastical History at King's College, London (Vol. III., 38,990–39,105),

Pointed out to the Commissioners the views entertained by the Reformers on the subject, and stated that, though there were differences as to the grounds upon which divorce ought to be permitted, the continental Reformers were agreed on the general principle that marriage was dissoluble, in certain circumstances, such as adultery, which they based on Our Lord's views, and desertion, in which views many extremely learned men in the Church of England concurred (38,996, 39,070–2, 39,079). He himself, however, considers that taking the conception of the Church throughout the greater part of its history, Our Lord certainly laid down a general principle which was absolutely binding upon Christians without any modifications (39,017–8), and that He, with the utmost strictness, forbade a re-marriage [after divorce] of any kind (39,033).

Rev. C. W. Emmet, Vicar of West Hendred, Steventon (Vol. III., 39,106–39,175),

Considers that the New Testament is clear and decisive in its statement of the main principle, but leaves a margin of uncertainty as to possible exceptions, and that the conclusion to be drawn is that we are meant to go to the Bible for principles, not for detailed legislation (39,114). In his view, adultery is clearly an exception to the general principle, and, arguing from the passage in the 1st Epistle of St. Paul to the Corinthians and its probable interpretation, his view is that it is not necessarily the sole exception. He thinks that the Christian Church ought to be able to acquiesce in certain other carefully restricted exceptions, but that whether those exceptions are really necessary is a point which should be decided by the social requirements and conditions of the age (39,116). Nor does he, when expressing this view, see that any distinction should be drawn between Christian and non-Christian marriages (39,128).

Rev. J. Cooper, D.D., Professor of Ecclesiastical History in the University of Glasgow and a Minister of the Church of Scotland(Vol. III., 39,176–39,303),

States that although the Church of Scotland recognises divorce for adultery and desertion, he considers it doubtful whether the clause "except for fornication" was ever spoken by Our Lord, and having regard to the uncertainty which is increasing among scholars on this point, he is of opinion that marriage should be treated as indissoluble (39,192–197).

Rev. Canon Hastings Rashdall, Fellow and Lecturer of New College, Oxford (Vol. III., 39,304–39,422),

Considers that while the only principle that is absolutely binding upon Christians for all time is, that the ideal of marriage is life-long monogamous union, a Christian may quite well recognise that the conditions of marriage are a matter, which the State should regulate, in accordance with its view of social expediency, provided that, in the notion of social expediency, is included the cultivation of a high ideal of life and character and not merely the promotion of maximum pleasure. He is of opinion that no principle of religion or morality forbids divorce with liberty of remarriage,

if a sufficient social advantage can thereby be secured, including, in the notion of social advantage a strong public opinion in favour of permanent marriage and fidelity to marriage bonds, and a generally healthy state of feeling as to sexual relations (39,306, paras. 4 and 7).

Rev. H. B. Swete, D.D., Regius Professor of Divinity, Cambridge (Vol. III., p. 316),

Considers that in its original form, Our Lord's condemnation of remarriage after divorce was absolute, *i.e.*, that He stated no exception, but he does not draw the inference that it is not lawful for the Church, or for a Christian State, to permit divorce or re-marriage in any circumstances. Both, however, are strongly to be deprecated, because both are departures from the Christian conception of marriage; neither was contemplated by Our Lord; and, if they must be conceded, this should clearly be done only under grave necessity, and because of the σκληροκαρδία [hardness of heart] which the new law of love has not yet dispelled (page 317).

Rev. W. Emery Barnes, D.D., Hulsean Professor of Divinity, Cambridge (Vol. III., 39,423–39,459),

Considers that the words "except for fornication" belong to Our Lord's own teaching, and that divorce (which is merely declaratory of a fact) may take place for the cause of fornication (39,426), which word the witness takes to mean all sexual immoral conduct (39,427–9). He does not regard the teaching to be found in the Gospels as teaching the absolute indissolubility of marriage, but its dissolubility only on the one ground of sexual immoral conduct after marriage (39,431). He could imagine the possibility of other things than adultery really destroying the bond of marriage effectively (39,436).

Mr. R. L. Blackburn, K.C. (Vol. III., 39,460–39,554),

Chancellor to the Primus of the Episcopal Church in Scotland, who attended by his request and the request of the Bishops of that Church, stated that the attitude of the Episcopal Church in Scotland in the matter of divorce is the same as that adopted by the Church of England (39,462), and that the first-mentioned Church adopted the resolutions passed by the Lambeth Conference in 1888, which were recousidered and repassed in 1908, and will be found set out in full later. He, however, pointed out that the Consultative Council of the Episcopal Church in Scotland recently passed a canon (which he expected would be ultimately adopted as a canon of the church) to the effect that—

> "no clergyman shall perform the marriage service for either of the two persons between whom divorce has been pronounced during the lifetime of the other party" (39,465);

and that in his view the Episcopal Church in Scotland, which has always held the view that desertion is not one of the grounds for divorce justified by Scripture (39,495), would also forbid re-marriage by a clergyman after a divorce on the ground of adultery whether the person was innocent or guilty (39,496–499, 39,507–508).

Rev. J. Scott Lidgett, D.D., President of the Wesleyan Methodist Conference and Warden of the Bermondsey Settlement (Vol. III., 39,717–39,780),

Considers that, even supposing the conditional words "except for the cause of adultery" have been introduced from another source, it hardly follows that they are spurious or have been simply introduced by reason of the infirmity of the flesh, and that moreover, after the long usage and the long understanding of the Gospels, it would at the present time be impracticable to turn aside from what has been so long the *textus receptus* for popular, as well as for scholarly, purposes everywhere (39,720).

The Right Rev. Pearson M'Adam Muir, D.D., Minister of Glasgow Cathedral and Moderator of the General Assembly of the Church of Scotland (Vol. III., 39,858–40,030),

Considers that it has always been taken for granted in Scotland that Our Lord's words are the basis for the grounds of divorce (39,971), and further that divorce for desertion is supposed to be the Scriptural inference, and is regarded as in accordance with the spirit of the New Testament (39,973).

Mr. C. N. Johnston, K.C., LL.D., Procurator of the Church of Scotland (Vol. III., 40,031–40,226),

Considers that the recognition of adultery and desertion, as grounds for divorce by the State, has been in harmony with the general law of the Church (40,035), but he does not consider that, as regards desertion, it originated on scriptural grounds, though those who advocated it would endeavour to show that it was within the sanction of Scripture (40,209).

Mr. Frederic Harrison, President of the Positivist Committee, 1880–1905 (Vol. III., 40,226*a*–40,257),

Considers that from the strictly religious point of view of the Positivists, there is normally and regularly neither divorce nor re-marriage, even though one spouse be left physically, but not spiritually, widowed (40,235).

Mr. Isaac Sharp, General Secretary of the Society of Friends (Vol. III., 40,258–40,292),

Does not suggest, on behalf of the Society of Friends, that the present divorce laws are contrary to the principles of the Society of Friends (40,290), but advocates that, as the Society has always proceeded upon the principle of the equality of the sexes in spiritual matters and in Church government, they should be placed on an equality as to causes for divorce (40,264–5, 40,289).

Mr. H. W. Hill, Secretary of the English Church Union (Vol. III., 40,293–40,359 and 40,438–40,444),

Considers that divorce is contrary to the law of Christ, as declared by the Church in the Book of Common Prayer where it deals with the marriage service, and in the Canons of the Church of 1603, of Canterbury and York of 1604, Canons 106, 107, 108, and that these are in accordance with the Gospel teaching (40,302–8), and he considers that there is no substantial difference between his opinion and that entertained by Mr. Wood as to the operation of the pre-Reformation canon law (40,438, 40,440).

Rev. E. G. de Salis Wood, B.D., Vicar of St. Clement's, Cambridge, Member of the Council of the English Church Union (Vol. III., 40,360–40,437),

Does not base his view that marriage is indissoluble upon any special Christian dogma, but bases it upon the fact that he regards marriage as a Divine institution, instituted in the time of man's innocency, that is, that, along with the creation of man, the Creator intended that there should be marriage between man and woman, and that it was not owing to the choice of man and woman that this condition of marriage arose, but that it was of Divine, not of human, origin (40,372–3). He considers that the Church holds marriage to be indissoluble, not only in the case of Christians, but of non-Christians also (40,384–5).

With regard to the teaching of the New Testament, he considers that, without any exception, marriage is indissoluble, and therefore divorce *a vinculo* impossible (40,387). Generally his view is, that the law of the Church of England rests, not upon the Canons of 1603, nor upon the Prayer Book, but upon the fact that the Canon Law, at any rate prevailing in the Western Church, including England, up to the time of the Reformation, was decisive against the theory that marriage was dissoluble, that no change was made at or after the Reformation in the law of the Church, and, therefore, it remains to this day as it was before the Reformation (40,387, 40,402).

Mr. A. J. Shepheard, Chairman of the General Purposes Committee of the Congregational Union, Secretary of the Protestant Dissenting Deputies (Vol. III., 41,785–41,855),

Presented the view of the Congregational Union that there should be no extension of divorce, beyond the one ground of unfaithfulness, but he also stated that, with regard to the scriptural ground, there was difference of opinion amongst Congregationalists as to whether Christ's command was absolute, without exception, or whether it allows one exception, or whether there may be more than one exception, all these views being held (41,821–2).

Rev. J. D. Jones, M.A., B.D., Ex-chairman of the Congregational Union of England and Wales (Vol. III., 41,956–42,017),

Stated that the general view of the Congregational Union was that adultery should be the sole ground, this opinion being based partly on scriptural reasons and partly on the general conception of marriage which obtains amongst Congregationalists (41,967–9), but some members expressed views in favour of divorce on other grounds (41,973–6).

41. Communications were addressed to various Church bodies, in addition to those to which the witnesses already mentioned belonged, and the following resolutions or statements were forwarded by some of them to the Secretary and put in evidence by him (42,018, *et seq.*) :—

The British and Foreign Unitarian Association.

The committee did not feel that there was any occasion for the association to be specially represented before the Commission.

The Baptist Union of Great Britain and Ireland

Did not think they could usefully give evidence.

The Primitive Methodist Church

Expressed the opinion that there should be equality, as between the sexes, in relation to the grounds of divorce.

The Salvation Army

Expressed the view that, having regard to the evidence already placed before the Commission, they did not think they could usefully occupy the time of the Commission further.

The General Assembly of the Presbyterian Church of Wales

Expressed the view, "that whilst equal facilities should be afforded to all classes "of the community of obtaining divorce where the bonds of marriage have been "violated by either party, great care should be exercised in any legal changes that "may be effected lest they should diminish the sanctity and obligation of the "marriage vow," and "that the legal and moral liability should be the same with "regard to both sexes."

The Presbyterian Church of England

Expressed the view that adultery was the only cause which the Church recognises as a proper ground for divorce, and believing adultery to be equally sinful on the part of the husband and of the wife, regards adultery alone, even if unaccompanied by cruelty, as a sufficient ground for divorce.

The Greek Church.

The Great Archimandrite felt himself unable to give evidence or prepare a memorandum.

42. The questions upon which the witnesses above referred to have expressed their views have been the subject of consideration at many ecclesiastical assemblies of various degrees of authority, during the last few years. We do not consider it necessary to cite the conclusions of any of these assemblies, with the exception of that known as the Lambeth Conference of Bishops in 1888. "That Conference was not indeed "a council, and did not set forth its resolutions as authoritative; but there is no "representation of the Anglican Church to which more weight will be universally "accorded . . . ." " . . . . There can, however, be no doubt that the "resolutions of the Lambeth Conference are by far the most important utterance on "the subject which the Anglican Church has delivered for centuries." (Mr. Watkins, "Holy Matrimony," pp. 430, 431.)

The Conference adopted three resolutions out of four drafted by a committee, the chairman of which was the Bishop of Chester. Those adopted are as follows :—

(A) "That, inasmuch as Our Lord's words expressly forbid Divorce, except in the case of fornication or adultery, the Christian Church cannot recognize Divorce in any other than the excepted case, or give any sanction to the marriage of any person who has been divorced contrary to this law, during the life of the other party.

(B) " That under no circumstances ought the guilty party, in the case of a divorce for fornication or adultery, to be regarded, during the lifetime of the innocent party, as a fit recipient of the blessing of the Church on marriage.

(C) " That, recognizing the fact that there always has been a difference of opinion in the Church on the question whether Our Lord meant to forbid marriage to the innocent party in a divorce for adultery, the Conference recommends that the Clergy should not be instructed to refuse the Sacraments, or other privileges of the Church, to those who, under civil sanction, are thus married."

These resolutions were reconsidered and passed again in 1908 by the Lambeth Conference in that year.

43. The evidence of the late Rev. Dr. Hermann Adler, formerly Chief Rabbi in England, and of Mr. Israel Abrahams, Reader in Talmudic and Rabbinic literature in the University of Cambridge, on the subject of the Jewish views on divorce will be found in Vol. III., pp. 406–411 and pp. 228–237 respectively.

44. We may conclude this summary by referring to the speech delivered by Mr. W. E. Gladstone, on the 31st of July, 1857, in opposition to the second reading of the Bill of that year, in the House of Commons, when he said :—

" Now, Sir, it is not to be dissembled that a very great diversity of opinion prevails with respect to the true construction to be put on Scripture in this matter. There are, in the first place, those who think that the prohibition of divorce—that is, divorce carrying with it the power of re-marriage—is absolute. There are those who think that there is in Scripture permission to marry after divorce in case of adultery alone, but that the permission is limited to the innocent man, and that there is not given to the woman, under any circumstances, liberty to marry. That I believe to be the most ancient opinion of the Christian Church after the old law, as I shall call it, of indissolubility. There are those who go one step further. They give liberty of divorce and re-marriage both to the innocent man and to the innocent woman. There are others who give liberty of divorce after adultery to both parties, if they are innocent, and to the man, although he is guilty. There are others, and that is the description of the Scotch law at the present moment, who give it to both whether innocent or guilty, provided there is no intermarriage between the guilty parties. There is another class that permits the intermarriage of the guilty parties, and there is another which considers that divorce may be permitted, not only for adultery, but for other causes. . . . . We have many causes far more fatal to the great obligations of marriage, as disease, idiocy, crime involving imprisonment for life, and which, if the bond be dissoluble, might be urged as a reason for divorce ; . . . . With respect to the great question of the indissolubility of marriage, let me observe that we had too much dogmatism, but the length to which I should push the argument is this—That the Gospel was intended to work out a certain great and provident result ; and the mode of attaining this result, the most precious and blessed for mankind at large, was, in the wisdom of God, not by means of commands and forms in a rigid shape, but rather by the infusion of a new spirit into the precepts of the law, a spirit that pervaded every artery and vein of society, raised its tone from the degradation of heathenism, abolished the cruel sacrifice of human life, abolished the exposure of children, abolished polygamy, abolished slavery."—(Hansard, 3rd series, vol. 147, 838–841.)

45. It seems clear that no common accord or understanding has been reached, even at the present day, although the controversies have turned and still turn mainly upon the actual words used in passages of Scripture, to which the witnesses have referred.

46. Having adverted to this difference of Ecclesiastical opinion, we think we should point out as a striking feature of the evidence that theological difficulties have weighed little with the great mass of the lay witnesses, and, that among those who feel them, there are great differences of opinion. With few exceptions, the lay witnesses pass them by, as if they concerned theologians rather than the practical legislator. English laymen seem generally to base their views, not upon ecclesiastical tradition or sentiment, but upon general Christian principles, coupled with common sense and experience of the needs of human life.

It has to be remembered that members of Christian Churches are not alone concerned in the matters which form the subject of our inquiry. There are large numbers of persons, subject to the State, who do not belong to any Christian communion, or are only nominally Christians, and are not interested in the theological points upon which opinions have been expressed before us.

47. The result is that we are unable to find any general consensus of Christian opinion, which would exclude any of the questions stated above from being freely considered. In view of the conflict of opinion which has existed in all ages and in all branches of the Christian Church, among scholars and divines equally qualified to judge, and the fact that the State must deal with all its citizens, whether Christian, nominally Christian, or non-Christian, our conclusion is that we must proceed to recommend the Legislature to act upon an unfettered consideration of what is best for the interest of the State, society, and morality, and for that of parties to suits and their families.

PART IX.

Conclusion as to the Basis of the Report.

48. We have come to the conclusion that our Report should proceed upon the basis that the State should not regard the marriage tie as necessarily indissoluble in its nature, or as dissoluble only on the ground of adultery; but, regarding the dissolubility of the tie as not limited to the ground of adultery, may allow other grave causes. What those causes are, and how they are to be determined, will be considered hereafter.

49. We are thus enabled, and consider it our duty, to examine the expediency of reform in relation to all the questions, which we have stated for consideration.

50. After the long inquiry upon which we have been engaged, and after close consideration of the mass of evidence which has been laid before us, we are of opinion that there is necessity for reform in this country, both in procedure and in the law, if the serious grievances which at present exist are to be removed, and if opportunities of obtaining justice are to be placed within the reach of the poorer classes. So far from such reforms as we recommend tending to lower the standard of morality and regard for the sanctity of the marriage tie, we consider that reform is necessary in the interest of morality, as well as in the interest of justice; and in the general interests of society and the State. We shall deal with these matters more fully, when we come to examine into the nature and extent of the reforms, which we think should be adopted.

51. It will be convenient to refer first to the necessity for the reform of procedure. It is beyond all manner of doubt established, by the evidence before us, that the cost and inconvenience of proceedings in London place such proceedings beyond the reach of numbers of the poorer classes. The matter could not be put more clearly than it was by Mr. Justice Bargrave Deane, who has had more experience of the Divorce Court than any other witness, having been in practice in that court at the bar as junior and leader for over 25 years, and a judge of the court for the last seven years. His evidence on the point was as follows:—

> "791. Perhaps on some of the matters we have to ask about your earlier experience will be very useful. You were counsel at that bar for the whole of your practice?—For over 25 years."
>
> "792. In the Probate and Divorce Division?—Yes."
>
> "793. So that you came personally into contact with the solicitors, and, of course, the parties to the suits?—And with the King's Proctor, which is perhaps more important."
>
> "794. I do not think that anybody perhaps possesses so much experience of the court as you do yourself. Now have you your memorandum which you have prepared, before you?—Yes, I have."
>
> "795. The first part deals with the question of courts, and I see you commence by saying that relief should be open to all, so far as it is possible to make it so. Perhaps, without going through the memorandum, you will give me a short statement of your views on the question of local tribunals?—I have approached this question, and I have always considered it rather from the moral point of

view than anything else; what will most tend to morality. I do not think you ought to look at what is expedient, or what is cheap, or anything of that kind; but what will make for the morality of the country, and my view is, that from that point of view, the question of divorce is more a question for the poor than the rich. The poor are more liable from want of education, and from want of surroundings, to fall into immorality than the rich. The rich have their homes, and their comforts, and their friends, who are of a different position, and who can, by their own advice and conduct, keep people straight; and therefore I feel that this Commission is dealing with the question of real honest morality. Apart from that, of course there is the question, which is the general question, of 'a law for the rich and a law for the poor.' That, of course, is so commonplace that I need not go into it. I think the divorce laws should be equally open to the poor as to the rich, in the sense that they require it as much as the rich do, and more so, in my opinion."

"796. Do you find, in your judgment, it is so at present?—Yes."

"797. I mean, do you find that poor people cannot, practically, owing to expense and otherwise, avail themselves of the High Court?—They are absolutely debarred from it, except those who live within reach of London, or who have a little more money than others, or who have saved up."

"798. Do you find that saving up has taken many years in some cases?—Many years. I have known a man take 10 years to save money for his divorce, and during all that time he was living on in a condition of being neither married nor unmarried. He was living like that all those years."

"799. I remember a case of 20 years?—Well, I have known of 10. I do not remember 20."

"800. Still, it is quite common for people to save for many years?—Yes. Now the question of divorce for the poor must mean local courts; you cannot bring them to London—it is impossible; and when you talk about local courts you are at once met with the great difficulty of harmony."

52. These statements are supported by practically the whole of the evidence which has been given before us on the question of the administration of justice. It is obviously unsatisfactory that, while courts have been established in which the poor can sue and be sued in respect of small debts and torts and compensation for injuries, they should have no means of redress in these graver matters, except in so far as they are dealt with under the jurisdiction possessed by the magistrates and justices in separation and maintenance cases.

53. It has been said that there is no demand for reform in this respect. This point will be dealt with fully under the head of Question I. later on, where we express the opinion that there is a real need and demand for reform.

54. It has been further said that it would militate against the morality of the poorer classes, if facilities for bringing their divorces and other matrimonial cases before the courts were extended, beyond those which at present exist. The evidence before us, and other general considerations, do not lead to this conclusion. The state of social morality before the Act of 1857 was the subject of strong comments, from time to time, by eminent preachers and writers, some of which, referred to by Canon Hensley Henson, will be found in his evidence (22,527–82). Mr. Bishop, whose book on "Marriage, Divorce, and Separation" is a standard work, writes thus of the period before 1857 (Vol. I., sec. 51, ed. 1891, pp. 21–2):—

. . . . "Indeed it is well known that in England, where divorces from the bond of matrimony have till lately been attainable only on application to Parliament, in rare instances, and at an enormous expense, rendering them a luxury quite beyond the reach of the mass of the people, second marriages without divorce, and adulteries, and the birth of illegitimate children, are of every-day occurrence; while polygamy is in these circumstances winked at, though a felony on the statute book. Laws punishing adultery, except as an ecclesiastical offence, are there unknown; and they are so in countries generally where divorces are not allowed, or allowed but for a single cause."

Section 52. . . . . "That the wrongs whence come divorces are evils no one denies. If the refusal of divorce would prevent them, all would pray for it. But the experience of every State and country withholding this redress is practically, however men theorize, that no form of matrimonial delinquency is

less prevalent there than elsewhere. And to the extent to which separations actually occur, the community is remitted back to the condition it would be in if marriage itself was abolished. Nor is there any subject other than marriage, upon which any man claims that the commission of a wrong can be prevented by the law's denying redress to the injured person."

55. The statistics of cases heard in the divorce court from its establishment to the present time show that the rate of increase of these cases is only rather more than the rate of the increase of the population. The statistics are given under the head of Question I. at p. 54, where the figures showing the increase of population are also given.

It will be convenient here to set forth the table, given in the Civil Judicial Statistics for 1910, p. 84, showing the position in life of the married persons who have been petitioners and respondents, in all matrimonial suits commenced in the Divorce Division in 1910. The total number of suits is 908, and on p. 29 thereof it appears that, of these, 755 were for divorce.

Husbands' Occupations at Date of Marriage.

(1) Occupations.	(2) 1910.	(3) 1909.	(4) Annual Average, 1906–10.
AGRICULTURE :—			
Farmers	16	17	16·0
Other persons	6	2	4·8
TOTAL	22	19	20·8
MINING :—			
Mine owners and managers	2	1	·8
Miners	9	20	13·8
TOTAL	11	21	14·6
MANUFACTURERS (including all persons employed in factories and workshops, and in building and engineering works) :—			
Builders and decorators	16	20	17·6
Metal workers	17	25	24·0
Furniture trades, wood workers, &c.	6	18	16·2
Makers of textile fabrics	7	9	9·4
Makers of clothing, &c.	11	21	16·8
Brewers and distillers	1	5	3·6
Makers of articles of food, &c.	3	6	4·6
Printers	9	13	9·6
Other trades	15	10	22·8
Not specified, labourers	17	22	22·8
Not specified, others	16	23	15·6
TOTAL	118	172	163·0
NAVIGATION AND FISHING :—			
Masters, mates, &c.	5	4	5·8
Seamen	8	9	6·6
Fishermen	—	—	1·2
Others	5	12	6·8
TOTAL	18	25	20·4
INLAND TRANSPORT (those employed on roads, railways, canals, &c., and the post office) :—			
Railways	7	9	9·8
Road traffic (coachmen, cabmen, carmen, &c.)	23	13	16·4
Post office	7	7	5·4
Docks, canals, &c.	1	—	2·2
TOTAL	38	29	33·8

(1) Occupations.	(2) 1910.	(3) 1909.	(4) Annual Average, 1906–10.
TRADE (including the clerical and business staff attached to mines, factories, &c.) :—			
Merchants, directors, &c.	58	49	45·2
Brokers, agents, &c.	58	59	54·2
Secretaries, clerks, &c.	55	72	61·0
Travellers, salesmen, &c.	43	46	43·0
Porters, messengers, &c.	9	8	9·4
Publicans, hotel-keepers, &c.	30	40	34·6
Dealers in articles of food	34	35	37·0
Dealers in clothes, furniture, &c.	19	9	12·6
Other dealers	38	35	40·2
TOTAL	344	353	337·2
DOMESTIC SERVICE	12	10	11·2
PROFESSIONAL EMPLOYMENTS, &c. :—			
Civil servants	5	3	5·2
Municipal officers, &c.	—	5	1·0
Military and naval officers	38	32	34·2
Soldiers and naval seamen	18	20	24·2
Police	7	4	5·0
Clergymen	6	5	6 4
Barristers	8	5	5·4
Solicitors	9	16	13·0
Law clerks	2	1	2·2
Physicians, surgeons, &c.	30	32	26·0
Veterinary surgeons	2	1	1·0
Schoolmasters, &c.	10	7	7·8
Students	2	1	2·0
Accountants	7	6	6·8
Journalists	13	11	10·2
Engineers, architects, &c.	52	39	44·4
Painters, &c.	14	7	8·6
Actors, musicians, &c.	40	35	39·8
Other professional occupations.	4	14	13·8
TOTAL	267	244	257·0
UNSPECIFIED OCCUPATIONS:—			
Gentlemen, esquires, &c.	71	105	83·0
Not stated	7	4	5·2
TOTAL	78	110	88·2
GRAND TOTAL	908	983	946·2

56. It is, of course, difficult to gauge exactly that of which no direct proof can be given, but so far as we are able to judge from the evidence and from general experience, we do not think that the standard of sexual morality is lower to-day than it was 50 or 60 years ago. Many symptoms and tendencies indicate the contrary, and progress would, we should hope, be greater, if the law affecting the matrimonial relations were placed upon a footing more consistent with the exigencies of human life than it is at present. We may refer to the opinion of a well-known writer and thinker who says:—

> "I do not believe that there is any real reason to think that the standard of domestic morals in England has been impaired by the strictly limited right of divorce which was granted by the Act of 1857. The scenes of shame and vice and domestic wretchedness that are often disclosed in the Divorce Court are certainly not produced by it, though much misery and wickedness which would otherwise have festered in lifelong secrecy are brought by its action into the light of day . . . .
>
> "Some good judges are of opinion that the standard of domestic morals, in a considerable section of the upper classes in England, has in the present generation been lowered, and that principle and practice have alike grown more lax. It is extremely difficult to arrive at any accurate judgment on such a subject, but it may, I think, be confidently asserted that, if such a change has taken place, it has been due to quite other influences than the divorce law. Sudden and enormous increase of wealth brings with it luxury, idleness, and self-indulgence. Cosmopolitan habits of life break down old customs and introduce new manners. The decay of ancient beliefs loosens many ties, and a few bad social influences in high places will affect the tone of large sections of society. On the whole, it seems to me that the signs of increasing moral laxity in England are more apparent in other directions: in increased worldliness and hardness, and craving for wealth and pleasure, among the young; in the increased social influence of dishonestly acquired money; in the frequency, the cynicism, and the success of gross instances of political profligacy."*

57. In considering the question as to whether or not it would militate against the morality of the poorer classes if further facilities were afforded to them of bringing their divorce and other matrimonial cases before the courts, we think it of the utmost importance to have in view the state of things, which the evidence discloses as existing at the present time and the effect of the present absence of facilities. It is obvious that if the law on the one hand recognises matters as intolerable wrongs for which it gives legal remedies, and on the other hand places those remedies beyond the reach of those who need to use them by reason of cost and inconvenience, such persons must either take the law into their own hands, and apply their own remedies, or be compelled to submit to hardships which the law has stamped as intolerable.

58. According to the evidence the standard of morality amongst the very lowest section of the community, sometimes known as the "submerged tenth," is deplorable. We refer on this matter to the evidence of Mr. Robert Holmes. It may be that the alterations in the administration of the law, which we suggest, will not at once produce a noticeable effect upon this class, but we think that they should not be shut out from all possibility of appealing to the law.

59. When classes in better circumstances than this are considered, as, for instance, artisans and others, the evidence shows, as might be expected, that a generally high standard of morality with regard to marriage exists, but that these classes, owing to proceedings for divorce being beyond their reach through cost and inconvenience, are exposed to special temptations to disregard the marriage law. The evidence shows illustrations of this.

For instance, a working man whose wife leaves him to live with another man, is practically compelled to take a housekeeper to look after his children and home, and the accommodation therein is such that, as witnesses point out, immoral relations almost inevitably result. So again, in the case of a woman, whose husband leaves her and fails to provide for her, she endeavours to support herself and her children by

* "Democracy and Liberty," by William E. H. Lecky (1896), Vol. II., pp. 168, 169.

letting lodgings, and the evidence shows how frequently this results in an irregular union with a lodger, or if she goes into service and meets some man to whom she becomes attached, but whom she cannot marry, similar results are apt to follow.

These consequences seem to occur to a very large extent in cases of separation orders, when there is no reconciliation ; more especially in cases of men, but they seem also to follow frequently, when there has been no such order.

We think it useful to refer in particular to the evidence of Robert Ernest Moore, barrister-at-law, who has been associated with the Poor Man's Lawyer Department at Cambridge House, Cambridge University Settlement, Camberwell Road (4804–19), Charles William Panton Barker, clerk to the magistrates of the county borough of Sunderland (10,821–2), Percy T. Pearce, solicitor, Plymouth, selected by the Plymouth Law Society to give evidence on their behalf (11,385), Robert Holmes, police court missionary, Sheffield, who was against any alteration in the divorce law (18,018), John Palin, police court missionary at Middlesbrough (18,203–7, 18,243–5), William Fitzsimmons, police court missionary at the Thames Police Court, Stepney (19,473), Miss Lidgett, a member of the St. Pancras Board of Guardians (20,138), and Dr. Scurfield, medical officer of health for Sheffield (21,919–24). A number of other witnesses speak to the same points.

One or two illustrations may be given out of the great number placed before us to show how the impossibility of procuring divorce operates.

We set out one, out of the number given by Dr. Scurfield (Vol. II., p. 390 *et seq.*) :—

"The husband of F. M. turned out to be drunken and unfaithful. She had been in domestic service before marriage. She left her husband on account of his behaviour, and went back to service.

"She has not seen her husband for several years, and does not know whether he is alive or dead.

"She now lives happily with J. D., who is an engineer's labourer. They have two children. The house is clean and comfortable, and to all outward appearances satisfactory.

"J. D. and F. M. would like to be legally married."

Cases somewhat too long to set out in the Report are given in the evidence of Mr. Frank Rowland, solicitor, Accrington (Vol. II., p. 227), as typical.

Dr. S. G. H. Moore, Medical Officer of Health for Huddersfield, said (Vol. III., p. 121), "a very long list of examples might be cited with, perhaps, variation as to detail though "the essentials appear to be identical in all the cases," and he gave the following examples :—

"(1) A gas stoker, R. E., having three children by his wife, drunken, unfaithful, and cruel; his wife left him seven years ago; she is now living with G. P. ; there are two children of this irregular union ; the home is clean, the children are well cared for, but they are bastards (I use this word deliberately in the attempt to convey, with full force, the horrible disability under which they must labour, all their lives)."

"(2) R. C., a tram driver ; his wife now living a life of ill repute in Leeds, he has formed a union with G. W., there are three children ; they are fine children, well cared for and their father and mother live happily together, yet they, though innocent, are bastards."

"(3) H. S., mill-hand, an alcoholic lunatic, detained in an asylum several times ; when he comes out he is a terror (please accept the word in its literal sense) ; he is a terror to his family, but three of the children are at wage-earning ages ; no illicit union has been formed."

"(4) R., a gardener ; wife a lunatic, has been in an asylum for a dozen years ; this man has relations who have helped and restrained him but he has recently formed an irregular association with a woman, who was, first of all, his housekeeper. The arguments, with which he defends his action, may not be logical or they may, but they are, at least, forceful, and, in effect, satisfy his neighbours."

"(5) M. B., after having one child by her husband which died shortly after birth, was compelled to leave him and commence working again for herself on account of his drunken habits and his cruel and immoral conduct. After a while she formed a union with another man."

Dr. Ethel Bentham gives several illustrations (Vol. III., p. 31), to which we refer.

Mr. R. J. Parr, Director of the National Society for the Prevention of Cruelty to Children, gives numerous illustrations some of which relate to the question of insanity and may be quoted:—

"36,627. Now we pass to paragraph 20?—Then there are the cases of insanity where relief should be obtainable. Here are three typical cases:—

"C.O. 83,407, February 1910.—S. cohabits with a man, her husband being helplessly insane and in an asylum for ten years. There are two children of the marriage and one of the illicit union."

"C.O. 83,611, February 1910.—M. Husband in an asylum, said to be a hopeless case. The woman works, receives parish relief, and some help from children."

"C.O. 83,608, February 1910.—J. Wife in an asylum. No probability of her release. The man is cohabiting with a widow."

"In each of those cases there has been no prosecution, but we were called in because of what I said just now. Some of the children were being improperly treated, and in each case we found a warning by the officer was sufficient. The inspector warned in each case, and on following that up with supervision we found that the children of the marriage were being properly treated, as well treated as the children of the illicit union. Warning had the desired effect."

"36,628. The two typical cases resulted in an illicit union because the other party to the marriage is confined hopelessly in an asylum?—Yes. I have found only one or two exceptions where we have dealt with cases where one or other of the parties is confined in an asylum. It is very rarely found that the person living at home has kept free from such an illicit union."

"36,629. Can you give any notion of the extent to which those cases have been brought before you? You say they are typical cases?—It is very difficult to speak in scores or hundreds, but in relation to the cases generally they are not a large proportion. The cases of insanity are not large in proportion to the general number of cases. I should not like it taken, as we had 52,670 cases last year, that a large number related to people who were in asylums."

"36,630. Are there enough, in your view, without getting exact figures, to justify an intervention on the ground that there is a substantial case?—I should say so, certainly. I considered that very carefully before putting it in my notes, and it occurred to me that the condition of things was such, and the proportion of cases such, that one was warranted in including that as a real reason."

60. It is material to refer to this, having regard to the suggestion by some of the witnesses, that, to afford further facilities for divorce, will lower the standard of morality, and respect for the sanctity of the marriage tie in this country. After a very careful consideration of all that has been brought before us, our conclusion is that the weight of the evidence which has been given before this Commission is to the contrary effect.

61. We can conceive nothing more likely to produce a sense of injustice and hardship, nor more calculated to bring the law into contempt among the people, nothing more inimical to the morality and the best interests of the country than that a system of judicature should remain unaltered which affords opportunity of redress to those who possess the means to use it, but by reason merely of cost and inconvenience, denies it to those who do not possess such means, and who from their surrounding circumstances, are necessarily more subject to the causes, which lead to matrimonial difficulties, and have less means of escape therefrom, without recourse to law, than their richer brethren. The principle, upon which a State should act, should be to enable all alike to obtain that justice, which the law recognises.

62. The weight of opinion is in favour of a reformed judicature and procedure, though there are differences of opinion as to the best method to be adopted. There is also a great weight of opinion in favour of a reform of the present laws, though there are differences of opinion as to the nature and extent of such reform. We shall deal with these questions more fully under the separate heads.

PART X.

QUESTION I.—SHOULD ANY, AND, IF ANY, WHAT COURTS HAVE JURISDICTION TO HEAR AND DETERMINE DIVORCE AND OTHER MATRIMONIAL CAUSES, AT ANY, AND, IF ANY, AT WHAT PLACES, IN ADDITION TO THE HIGH COURT SITTING IN LONDON?

63. The exercise by the High Court of its jurisdiction over divorce and other matrimonial cases is confined to London, although its jurisdiction in general common law and criminal cases is exercised all over the country at the assize towns. The jurisdiction of the county courts is fully shown in the Report of the County Courts Committee to the Lord Chancellor in 1909. It includes a limited jurisdiction in cases of contract and tort, with some few exceptions; a jurisdiction by consent of the parties to try any ordinary common law action without any limitation of amount; an equity jurisdiction in many matters where the estate or fund does not exceed 500*l.*; a limited jurisdiction in Admiralty cases, exercised by certain appointed county courts; jurisdiction under the Employers' Liability Act and the Workmen's Compensation Act; jurisdiction in Bankruptcy of a most extensive character, exercised by courts which are not excluded by the Lord Chancellor from having such jurisdiction; and jurisdiction in numerous other matters set out in detail in the said Report, to which we refer. That Report contains many suggestions for improving and developing the county court system, which have not yet been adopted, although a Bill for that purpose has been before Parliament. That Bill did not deal with the question of divorce.

64. Besides the High Court, with its civil and criminal jurisdiction, and the county courts, with their civil jurisdiction, there are the Courts of Chancery of the County Palatine of Lancaster, certain inferior courts, and the courts of quarter sessions, recorders, stipendiary magistrates, and justices, all exercising their functions locally; and the last two exercise the jurisdiction conferred by the Summary Jurisdiction (Married Women) Act, 1895, and the Licensing Act, 1902, more particularly hereafter dealt with. It will be found, therefore, that, except in the case of divorce, there are courts of which the poorer classes can avail themselves in practically all the emergencies of their lives, and which deal with all their debts, torts, and crimes. This exception is remarkable, for before 1857 such divorce as was obtainable, viz., *a mensâ et thoro*, could be proceeded for in the consistory courts. The cases were not numerous, owing to the cumbrous and costly nature of the proceedings.

65. As previously stated, power to hear cases of judicial separation and restitution of conjugal rights was given in 1857 to the judges of assize, but was taken away by an Act of the following year. From that date, until the Acts of 1878 and 1886, hereafter referred to (p. 66), matrimonial causes of all kinds had to be brought in the court in London; and with the exception of the orders which can be made under the Summary Jurisdiction (Married Women) Act, 1895 (which repealed the provisions of the Act of 1878 relating to this matter and the Act of 1886, and contained provisions modifying somewhat those in the said Acts), and the Licensing Act, 1902, the position remains the same: this is so not merely with regard to divorce cases, but with regard to cases for judicial separation, restitution of conjugal rights, and nullity of marriages, &c.

66. The following questions then arise:—

(1) Are the present means of administering the law such as to place the law beyond the reach of those who are in poor circumstances?
(2) Is there any substantial demand for reform?
(3) Is it desirable that changes should be made?

First Question.

67. With regard to the first question, we may quote the following passage from the said Report of the County Courts Committee:—

> "There is a close analogy between the state of things which still exists and that which existed before 1858. For there is still practically one law for those who can afford to bring a suit in the divorce court and another for those who cannot, and the latter embraces a very large portion of the population who cannot afford even the moderate expense of a suit in the present court. The cost of bringing or defending a suit in London and having the hearing there, renders

it quite impossible for many of the poorer classes to get the relief which those better off obtain. The great proportion of the cases are undefended, but proof of the facts before the judge is necessary; and even in these cases, poor people very frequently cannot find the money to commence and proceed with these suits and bring their witnesses from a distance to London, nor can they find the time or leave their employments for sufficient time, either to file their petitions in London, which practically they have to do themselves unless they have a solicitor, whom many of them are too poor to employ, or to attend a hearing in London. This is especially the case with parties who are at any substantial distance from London. Letters on this subject have been constantly received by the late President of the court from poor people urging reform in this matter, and protesting against the injustice to them of the present system. On the one side, people often cannot find the means to bring their suits at all, or only after saving up for years to do so. Many instances of this latter class come to the notice of the court. On the other hand, many persons cannot find the money or time to come up to London to defend themselves. And, further, as the husband usually has to find the means to enable the wife to defend herself or sue him, many cases are stayed because of his inability to do so, a state of things which may last for months or years, or never be overcome, and this even applies to cases where there is really no defence.

"Without doubt there is a practical denial of justice in this matter to numbers of people, and these are people who belong to ranks in life in which the relief to be obtained under the Divorce Acts is probably more necessary than in ranks above them."

68. The view expressed in that Report is entirely supported by a very large body of professional evidence which has been placed before us.

69. Mr. Alfred Musgrave, one of the Registrars of the Principal Probate and Divorce Registry, stated (60, 61) that the average minimum cost of an undefended London case would be about 40*l.* or 45*l.*; and (62, 63) that, when the witnesses came from Lancashire, these figures, he thought, would be as nearly as possible increased by 12*l.* or 13*l.* He gave instances of some cases, one an undefended case, where the witnesses who were few came from Yorkshire, some from Rotherham and some from Sheffield, and the costs were taxed at 56*l.* 2*s.* 1*d.*; another from London, costs taxed at 42*l.* 3*s.* 11*d.*; another from London, costs taxed at 46*l.* 16*s.* 1*d.*; a small case, in which the costs were taxed down to 28*l.* 16*s.* 8*d.*; and another where the witnesses were near London, and costs were taxed at 68*l.* 9*s.* 3*d.* (59, 80–3).

The costs in the ordinary class of defended cases, he said, vary from 70*l.* to 500*l.* (85, 86); court fees in an ordinary case he placed at not more than about 7*l.* (156). With regard to pauper cases he put in a list of pauper petitions filed in three years (Vol. I., p. 16).

Number of Pauper Petitions Filed.

—	By Solicitor.	In Person.	Total.
1907 - - - - -	51	4	55
1908 - - - - -	45	8	53
1909 - - - - -	58	8	66

He stated that a London undefended pauper case would, "if the witnesses are cheap witnesses," cost about 10*l.* (71), and that the cheapest undefended pauper case from Lancashire or Yorkshire would cost from 15*l.* to 20*l.* (127); and he gave a list (Vol. I., p. 16) of some cases of pauper expenses taxed in 1907, 1908, and 1909, in which the costs were from about 12*l.* to 21*l.*, and in the list are two cases in London costing respectively 4*l.* 10*s.* and 5*l.* 0*s.* 6*d.*, which are stated to have been the only two cases in three years of taxed expenses of paupers suing in person; and one of 5*l.* 0*s.* 10*d.* from Lincolnshire with no explanation; we should gather that the pauper in this latter case must have conducted the case, and that his witnesses must have been in London.

70. The costs mentioned by Mr. Registrar Musgrave are the taxed costs, as he only knew the result of taxation where bills came before him as taxing master (53); there would generally be costs and expenses in excess of taxed costs. The figures show a

cost, in ordinary cases, altogether beyond the means of a working man except in the rare cases in which he can obtain considerable assistance from friends, or save up money for years. It must be remembered too that the position in these cases is not like that of ordinary litigation, where two separate sides have to incur costs. In these cases, the man has to find the means for both sides. He has to secure his wife's costs in any case which she brings or defends, unless she has separate estate, which, among the poorer classes, is so rare that it may be left out of account. The burden of this is so great that male petitioners are often unable to pursue the proceedings, which are stayed until means for the defence are found, and, if the husband is defender, and has a difficulty in providing the security for his wife's costs of hearing, a motion to commit him can be made.

71. The position is serious enough in London cases. It is still more so in country cases, where the local solicitor has to employ a London agent, and the parties and witnesses must travel up to London and often stay over night, or, if a case lasts more than a day, more nights than one.

Take, for instance, a case from Newcastle-on-Tyne: a return ticket to London, third class, costs 2*l.* 5*s.* 3*d.* If, in an undefended case, the petitioner (who must be called save in very exceptional cases), his solicitor or a clerk, and, say, three witnesses are called from Newcastle, the fares alone amount to 11*l.* 6*s.* 3*d.*, and there are expenses for a night. There are simple cases in which only one witness, besides the petitioner, is required, but there are others in which more than three may be needed. There are also many cases in which a doctor, clergyman, or other official has to attend. The expense and inconvenience are especially great in the case of medical evidence.

In many cases, the railway fares are, of course, smaller than from Newcastle; but sufficient has been said to call attention to the difficulty caused by the mere travelling expenses, which may have to be found by the petitioner out of his weekly earnings or his savings. When the case is defended these expenses will have to be provided for both sides, as well as expenses in London dependent upon the length of the case, and of the cases before it in the list. Parties are often necessarily detained until their case is reached.

Although most divorce cases are undefended, there are many cases which might be defended if the cost could be provided, and in cases in which there is a defence, it is impossible for the poorer classes to bear the heavy expenses of attending trials in London, which may last for several days, and to provide the expense not only of themselves and witnesses, but of counsel and solicitors.

72. In addition to the question of actual cost, many witnesses pointed out that working people at a distance from London are at a great disadvantage in this, that they cannot easily get away from their work for a time sufficient to attend a hearing in London (more especially if the case is not disposed of on the day of their attendance), and that they are apt to lose their employment if they absent themselves. This is particularly the case with men and with women, who are wage earners; and, if they are defendants, the result may be that they remain away rather than run the risk of loss of employment. Similar considerations apply to witnesses from the labouring classes.

73. With regard to pauper causes, it will be noticed, from the statement above, how few of them there are, and how extremely few are in person. The table only gives petitions filed. It does not show how many were actually heard. From Mr. Registrar Musgrave's evidence it would appear that only about 15 per annum are heard (118). Of these petitions filed, some are stayed by applications for security, and some do not proceed by reason of expense. From the table of pauper expenses taxed (Vol. I., p. 16), it also appears how few pauper cases come up for taxation of costs, viz., four in 1907, four in 1908, and six in 1909.

In pauper suits at present the petitioner must obtain leave to proceed *in formâ pauperis* after counsel has advised that there is reasonable ground for proceeding, supporting the application by an affidavit of truth, and stating income (not exceeding 30*s.* to 32*s.* per week, though, in case of a wife suing, this limit may be extended to about 40*s.*), and no means above 25*l.* and clothing (77, 134–8, 187, 197); and a wife's affidavit must give similar particulars as to her husband. Applications to defend *in formâ pauperis* may be made by husband, wife, or co-respondent. No court fees are payable by a pauper (152–5), but neither counsel nor solicitor is assigned. In practice, pauper cases in the divorce court are usually conducted by counsel and

solicitor. In undefended cases a party sometimes manages to do it by himself or herself, but to do this, presence in London is necessary to file the petition, make the necessary applications, &c., and attend the hearing, and even if the parties can attend it is difficult to conduct their cases without legal assistance. The result is that they have to find some little money for their solicitor, and though solicitors are often good natured enough to assist them for nothing, we find that solicitors are naturally reluctant to take up these cases, and the small number brought before the court show that this procedure does not meet the needs of the poor.

Lastly, on this point of paupers, we may notice that a strong objection is felt by many who consider that their self respect is compromised if they are compelled to have recourse to pauper proceedings.

74. The evidence of Mr. Justice Bargrave Deane, given above (p. 37), upon the general question is important.

We do not think it necessary to refer to all the evidence as to cost which was given by many witnesses, but a few references will suffice to show the general accord with the statements made by Mr. Registrar Musgrave:—C. H. Pickstone (2557 *et seq.*); H. Gough (3196 *et seq.*); T. P. Griffithes (3390 *et seq.*) (partner in a firm having a large London agency business, who states (3612): "I think there is no doubt, "sir, that as far as the actual working classes are concerned, the present cost of divorce "is prohibitive"); T. Smith Curtis (4028 *et seq.*); Sir W. Cobbett (10,002 *et seq.*); Arthur Willey (10,154 *et seq.*); W. Simpson (11,317 *et seq.*); P. T. Pearce (11,389); W. H. Winterbotham (President of the Law Society for 1910) (11,547–9); C. E. Longmore (requested by the Associated Provincial Law Societies to give evidence) (12,000–5); H. M. Lloyd (12,406); His Honour Judge J. V. Austin (12,641 *et seq.*, 12,793); W. H. Whitelock (13,070); F. F. Palmer (14,817 *et seq.*).

75. Apart from the witnesses on specific points, the evidence, from that of the Lord Chief Justice of England downwards, recognises that the present system is not satisfactory.

76. We may here notice how much England is behind some other countries in its provisions for pauper cases. We refer on this point to the evidence of Lord Salvesen (Vol. I., p. 251) and Mr. J. B. Lorimer (*ib.*, p. 277) with regard to Scotland, and to that of Dr. C. Neuhaus (Vol. III., p. 473), Monsieur Mesnil (*ib.*, p. 478) and Dr. W. R. Bisschop (*ib.*, p. 505) with regard to Germany, France, and The Netherlands respectively. Not only are the poor in these countries relieved either entirely or largely from expense, but they have in the last-named countries courts easily accessible all over the countries. This largely accounts for a far larger number of divorces in proportion to the respective populations in those countries than we find in England, and shows how fallacious it is to consider that a small number of divorces in England is indicative of a high state of morality in the country.

Monsieur Mesnil's figures showed more than 9,000 applications per annum to be placed on the poor roll in divorce cases, and the numbers of permissions and refusals. He also explained how it is that these figures are so large in France; we shall refer to his observations when we deal with the grounds of divorce later in this report.

77. We have come to the conclusion that beyond all doubt the present means of administering the law are such as to place it beyond the reach of the poor. One of the most striking features of the evidence of those familiar with the poorer classes is an almost unanimous opinion that they treat the law of divorce as a matter which is beyond their reach, and act as if it did not exist, with direct consequences of which it is lamentable to hear.

Second Question.

78. Is there any substantial demand for reform?

If there is to be a law of divorce, and if courts easily accessible for the purpose of administering it can be provided without difficulty, and if those courts are presided over by judges competent for the purpose, there can be neither justice nor common sense in not opening those courts to the suitor, who claims the benefit of that law, and cannot otherwise enforce his claim. If the present law be a law which ought to be repealed or altered, then it should be repealed or altered; but if it be and

remain the law of the land, or if that law be extended, everyone who needs it should have access to courts ready and able to administer the law, if given jurisdiction to do so.

79. The large body of evidence, which has been placed before us from all parts of the country, shows that there is a real need and widespread demand for reform. It is not to be expected that such demand would take the shape of public meetings to advocate reforms. The unfortunate people, who are sufferers from the present state of the law and its administration, are not numerous in proportion to the great body of the community, whose domestic lives are happy, prosperous, and contented, or at least bearable. The sufferers do not air their grievances on the house tops. The nature of these grievances is such that every effort is made, in most cases, to keep them from the eyes and ears of relatives, friends, and neighbours, until they become too hard to bear. The evidence of numerous witnesses, however, shows how this demand is manifested. We may specially refer to evidence from some of the representatives of the leading law societies in the country; to the evidence of certain of the county court judges, magistrates, and lawyers, and others; to evidence from gentlemen who have the management of certain societies for the aid of poor suitors; to the evidence of those who represent the societies for the prevention of cruelty to children; to the evidence from workers amongst the poor, and to that of several medical officers of health, and many others, including representatives or resolutions from certain of the Churches. Reference may also be made to the evidence as to Wales given by the Right Hon. Sir David Brynmor Jones, K.C., M.P. (Vol. III., 43,137 *et seq.*).

We have also received a large number of letters from all parts of the country giving particulars of cases pressing for reform. Specimens of these sufficient to illustrate the nature of the complaints and demands made by the writers will be found in Appendix XXVI., pp. 172 *et seq.*

80. As against this body of evidence coming from those who speak from experience and from contact with persons whose matrimonial difficulties have been brought before them, we have had evidence from certain witnesses, of whom the principal appear to be those representing the Society of the Mothers' Union—the Hon. Mrs. Evelyn Hubbard, vice-president, and Mrs. E. Steinthal, Ripon diocesan honorary secretary of the Union, and Mrs. Church, a worker therein. The objects and principle of the Union, as stated in the evidence of the first-named witness, are:—

> "(1) To uphold the sanctity of marriage. (2) To awaken in mothers of all classes a sense of their great responsibility as mothers in the training of their boys and girls (the future fathers and mothers of the Empire). (3) To organise in every place a band of mothers who will unite in prayer, and seek by their own example to lead their families in purity and holiness of life. The Mothers' Union is a Church of England society, founded on the Bible, and on the Prayer Book as proved by the Bible, and is under the patronage of the Archbishops and Bishops, and works on Church lines. All married women are welcomed as members, except (1) those who are violating the sanctity of marriage by breaking their marriage vow; (2) those who deny the divinity of our Lord Jesus Christ; (3) those mothers who neglect to bring their children to Holy Baptism; (4) those who are notorious evildoers."

These witnesses suggest either that there is no demand, or a very limited demand, for reform. But their experience seems to have been chiefly amongst those who have not been sufferers from matrimonial trouble, and their views appear to be affected by the ecclesiastical aspect of the question of divorce, and by their connection with those who hold views on religious grounds as to the indissolubility of marriage.

A circular was sent round by the Union to its members for signature in the following terms:—

> "*Protest.*
>
> "I desire to add my earnest protest against the extension of facilities for divorce. I believe that to cheapen or extend the grounds of divorce would be against the moral and social interests of rich and poor alike, and would encourage the seeking of divorce for trivial reasons.
>
> Signatures.....
>
> Collected by.....
>
> "N.B.—No one should sign one of these papers more than once."

Protests in this form were handed in by the Hon. Mrs. Evelyn Hubbard, who stated that they were signed by about 21,389 women, presumably members of the Church of England (16,910–1). But as against proposals that divorce should be granted for "trivial reasons," many people who approve of reform might be ready to sign protests.

Resolutions were also passed at various meetings of the said Union in the following terms :—

"*Resolution.*

"The members and associates present earnestly protest against any extension of the facilities or grounds for obtaining divorce, believing that any such extension would lower the ideal of marriage in the minds of the people, and injure the home life of the country.

Number present.....

Parish.....

Diocese.....

Name of Branch Secretary or Enrolling Member.....

Date....."

The aforesaid resolutions were handed in by Mrs. Steinthal, who stated that the number of votes in support of them collected at different meetings of respectable working women, mothers, amounted to 85,491 (17,071–85). Mrs. Steinthal also handed in two books entitled "Memoranda of Evidence collected by the Mothers' Union from Officials, &c.," and the details thereof are given in Vol. II., pp. 196 to 203. They show considerable differences of opinion among those from whom the returns were obtained, the great majority, however, considering that there is either no demand, or no widespread demand, for facilities for divorce. At the same time, they disclose a very low state of morality amongst the poor, and bear witness to the widespread ignorance of their legal rights, which exists on the part of the poor, and to the extent to which separation orders conduce to immorality.

Protests were also sent to the Commissioners signed by over 2,000 members of the Church of England Women's Help Society against the extension of facilities for divorce. A specimen copy of this protest will be found in Appendix XXV. B., p. 162.

Copies of other resolutions, most of which were passed at clerical meetings, against extension of such facilities which have been received by the Commissioners will be found in Appendix XXV. C., pp. 162–7.

We also refer to the evidence of, amongst others, Thomas Holmes, Secretary of the Howard Association (17,705), J. C. Holmes (18,361), W. Lightfoot (18,508), H. F. Pike (18,617), F. W. Barnett (19,224), C. Wright (19,326–7), J. Massey (19,408), W. Fitzsimmons (19,556), H. Goldstone (20,860), Rev. H. G. Jones (20,931). With regard to this class of evidence the observation made by Mr. Fitzsimmons is weighty :—

"It is not so much a question of demand. I think the poor should not be denied the benefit of any law by reason of poverty. Respecting the question as to whether there is any demand for it, it ought to be remembered that the poor have known that the question of divorce was so far out of their reach that the idea of asking for the thing never occurred to them."

We further refer to the evidence of the Rev. E. S. G. Savile, who handed in protests and resolutions from various branches of the Church of England Men's Society. He stated that the total number of members, who have signed their names, is 11,352, and those, who have sent in unsigned petitions, represent 17,715, making a total of 29,067. The effect of these protests and resolutions is so fully given in the evidence of Mr. Savile, the secretary of the society, in Vol. III., pp. 324–8, that we have not thought it necessary to print copies of them in the Appendices. They are opposed to any extension of facilities, and many of them are in favour of a repeal of the Act of 1857. Some are in favour of the equality of the sexes, and some are in favour of prohibiting the reporting of details of divorce cases.

We also refer to the evidence of Mr. Hill on behalf of the English Church Union (40,293 *et seq.*).

81. Our conclusion is that this second question should be answered in the affirmative, viz., that there is a substantial demand for reform.

Third Question.

82. Is it desirable that changes should be made?

Two main aspects of the subject of reform in the administration of the law must strike anyone, who examines the evidence before the Commission. The first is that in accordance with the whole movement of the epoch in which we live, whatever remedies for legal wrongs are within the reach of the well-to-do should be placed by the State within the reach of the poorest in the land, so far as it is reasonably possible to do so. It is said that the poor can never be placed in a position to bring their grievances before the High Court with expensive counsel and solicitors, and can never be placed before the law in the same position as those possessed of means, and that, therefore, there must always practically remain one law for the rich and one for the poor; and it is said that to maintain a High Court in London for these cases and to establish local courts with limited jurisdiction would be to maintain the distinction. But these suggestions are not sound. When people have the means they will naturally employ every means in litigation which their money enables them to take, and when they have little means they may have to be content with less expensive litigation, but none the less the State should provide tribunals suitable to their means. This is done in respect of all litigation except divorce.

83. The second aspect of the subject which the evidence brings into prominence is the greater need of the poor with regard to divorce than the rich. As already pointed out, the latter have far more power than the former of mitigating the hardships and miseries which are inflicted upon them by the destruction of a matrimonial home through misconduct of one of the parties. The labouring man is under exceptional disadvantages in this respect. His house is small, he is at work all day; he has no one but his wife to look after his home and children. If she prove unfaithful to him and leave him, or is judicially separated from him, the man is driven to find some woman to look after his house and children, and he takes a housekeeper. The witnesses show how the want of adequate separate sleeping accommodation almost inevitably leads to the formation of a connection of an illegitimate character, and under the present condition of things a man so situated cannot place himself in the position of being able to form a new regular union.

84. Again, in the case of a woman of the same class, if her husband prove unfaithful to her, or desert her, and she be separated from him, she is left without any means of support for herself and children, except an inadequate maintenance ordered by the magistrates or justices which is often not recoverable. We have already pointed out how her circumstances, her slender means, her very efforts to increase them by taking in a lodger in a small house all expose her to temptation, with often disastrous consequences, which might be avoided had she had the means of freeing herself from her former tie.

Take again the case where husband or wife, as the case may be, deserts his or her spouse and emigrates to the United States or the colonies, a class of case of everyday occurrence. Probably in almost every case the emigrant either takes a companion, or finds one in a new country, and sets up a new home. The person left behind will often be found after a time living with someone else. Under the circumstances in which they live, and given the natural tendencies even of the most moral of human beings, the consequences described will frequently happen.

85. We are of opinion that the administration of the law should be reformed.

REMEDIES SUGGESTED AND COMMENTS THEREON.

86. Suggestions of remedy come from all (with few exceptions) but those who maintain on scriptural grounds that there should be no divorce, and that, however regrettable it may be, innocent people must, on these grounds and in the general interests of the community, be left to suffer from the hardships and miseries, which result through no fault of their own from unfortunate marriages.

87. The suggestions for remedial legislation are various, and may be thus stated:—

(*a*) That there should be trial at assizes.
(*b*) That there should be trial by a judge of the Probate, Divorce, and Admiralty Division, proceeding round the country.
(*c*) That there should be trial before a registrar of that division, proceeding to the locality.
(*d*) That all the cases should be still heard in London, but that the cost of witnesses, in poor cases, should be provided at the public expense.
(*e*) That evidence should be taken by affidavit or otherwise locally, and the decision pronounced in London.
(*f*) That courts of summary jurisdiction should have divorce jurisdiction.
(*g*) That the county courts should have divorce jurisdiction.

88. We take these in their order. But we first make this general objection to most of them that their adoption will not enable the scheme to be carried out, which we propose hereafter with regard to limiting the powers of courts of summary jurisdiction and for affording opportunity for applications for permanent separation orders, &c. to be made promptly and conveniently to the High Court sitting locally. This will be more fully appreciated when our further recommendations are considered.

89. (*a*) *Assizes.*—This suggestion was supported by the Bar Council, whose views and suggestions were presented by Mr. W. English Harrison, K.C., chairman of the General Council of the Bar (Vol., I. p. 464 *et seq.*), and by some other witnesses who dealt with this branch of the subject. It was not approved by most of the witnesses from the other branch of the legal profession, nor by some members of the Bar practising in the Divorce Division. There are several important objections to its adoption.

(1) The assizes are not held with sufficient frequency to meet the necessity for dealing with matrimonial cases with promptitude. The position produced by the break-up of a home should be dealt with at once.

(2) There is considerable objection to matrimonial cases, especially small cases where cost and convenience are of moment, being introduced into an assize list, having regard to the uncertainty of its duration and of the time when cases will be reached, especially where one assize judge has both criminal and civil work to dispose of. Criminal work is almost invariably taken first at such an assize, and both criminal and civil work are of uncertain duration.

(3) There have been complaints as to the present system of assizes, which we need not enter into in detail, but it would not add to the easy disposal of business already sufficiently difficult, to increase the lists by adding divorce cases. A table is given at p. 58 *et seq.*, showing the places where assizes are held and the annual number of assizes for civil business at each place.

(4) The costs at the assizes would be much the same as in London, except for the travelling expenses, and far more than the costs in the county court. A good deal of evidence was given on this point, but we may illustrate it from the evidence of Mr. Frederick Walter Dendy, who is District Registrar of the High Court at Newcastle-on-Tyne and Registrar of the county court at that place:

> "2999. Will you just give us those figures? I do not know whether they lead to definite conclusions?—In the 11 years in which I have acted as district registrar of the High Court I have taxed the bill of costs of the successful party in 77 assize actions, which were Newcastle district registry cases tried either at Newcastle-on-Tyne or at some adjacent assize town. The average amount of the costs as taxed in each of these 77 assize actions has been 108*l.* 5*s.* 10*d.*, roughly speaking 100*l.* The highest bill as taxed by me was 320*l.* 7*s.* 10*d.*, and the lowest was 36*l.* 9*s.* 8*d.* During the five years that have elapsed since the County Courts Act of 1903, extending the jurisdiction of the county court to cases over 50*l.*, has been in operation, I have as registrar at the county court taxed the costs of the successful party in 47 actions tried at Newcastle under the extended jurisdiction. The average costs of those actions was 30*l.* as against 100*l.* The highest of those bills was 106*l.* as against 326*l.*, and the lowest was 8*l.* 14*s.* 6*d.* as against 36*l.* 9*s.* 8*d.* I would like to point out the curious result, that not only is the average just under one-third, but the highest is just under one-third, and the lowest is just under one-third, and therefore, I think, you may say, from my experience in that

particular district, the cost of an extended jurisdiction action in the county court is just under one-third of an assize action trial."

"3000. Were those assize actions all of larger calibre, larger matters which would require more expense?—No. On the whole they were larger, in point of fact. I do not think you can estimate the size of an action entirely by the amount claimed, and, moreover, a good many of them were only tried at the assizes, because slander and libel are excluded from the jurisdiction of the county court."

The witness was apparently dealing with the present system of procedure taxed on two different scales, the High Court and County Court, and, if a simpler procedure were applied in the High Court, the costs would be diminished.

(5) There would be no judge in the locality, between the assizes, to whom interlocutory applications could be made, *e.g.*, applications as to custody of children.

(6) The judges of assize are all the King's Bench judges, and include those who may be Roman Catholics, or do not desire to exercise divorce jurisdiction. This point does not seem to have been sufficiently appreciated by those who advocate trial of these cases at assizes.

For reasons, which appear hereafter, we do not propose that the heavier cases should be heard out of London, and it does not seem desirable that the assize judges should be burdened with a number of small divorce cases, which might more conveniently be disposed of before another tribunal.

90. (*b*) *Judge of the Probate, Divorce, and Admiralty Division proceeding round the country.*—The objections to assizes (other than No. 6 above) apply with equal force; and, moreover, the two judges of the Divorce Division have their time fully occupied in London with Divorce, Probate, and Admiralty work. Even if one of them could be spared for country work, he could not give adequate sittings all over the country. It would be found that his whole time was taken up, and that long intervals would take place before he could visit the same place again. Moreover, this plan would be to institute a sort of High Court assize with all the state and expense attending the sitting of a High Court judge at assizes.

This suggestion, which comes principally from those associated with the present court, we consider impracticable.

91. (*c*) *Registrars of the Divorce Division.*—This suggestion was only faintly made and is open to similar objections. These officers have work which occupies their whole time, and, moreover, their experience is not such as to qualify them for trying cases.

92. (*d*) *Providing expenses for trial in London.*—This suggestion would permit of the proceedings being carried on in the district registries, or even in the county courts, until hearing, but the trials would take place in London, and the expenses to the parties of bringing their witnesses up to town would be borne by the State, or possibly by the locality, in cases of necessity. The suggestion, in one form or another, met with the approval of the Lord Chief Justice, Lord Mersey (Sir John Bigham), and others. We, however, cannot recommend it for acceptance.

(1) In the first place, we think it would be reasonably asked—by the Treasury, on behalf of the taxpayers, or by the local authority, on behalf of the ratepayers—why should the country or the locality pay for the cost of parties and witnesses coming up to London, possibly on both sides of a case, when tribunals can be provided at their doors, ready and competent to dispose of the cases? Such a question contains its own answer. Moreover, we fear that the suggestion, if adopted, might lead to abuse.

(2) Further, the provision of the expenses of witnesses would not, in our opinion, meet all the extra expenses of bringing interlocutory proceedings, which require a judge's consideration, before the judge in London, and of the employment of London agents for such work as had to be done in London.

(3) We also think that the suggestion does not cope with the difficulties, dwelt upon by so many witnesses, in which labouring men and women are placed, if they have to be absent from their locality for any substantial time. This applies with equal force to witnesses who come from the same class of life as the parties, and with strong force to such persons as doctors, and anyone holding an official position, and the solicitors in the cases.

if, for example, there were in Liverpool a court competent to hear an undefended case of a simple character, which would take not more than a quarter of an hour to dispose of (and this is generally the case with undefended cases, of which about 20 a day are disposed of in one court: by far the largest proportion of cases are undefended) it would seem an unnecessary and unreasonable course to send everyone concerned up to London. Yet this is the course followed at present in cases from all over the country to the great inconvenience of the solicitors, parties, and witnesses in the undefended cases, nearly 600, annually heard.

93. (*e*) *Taking Evidence by Affidavit or otherwise locally and deciding the case in London.*—It is essential in our opinion that the judge who decides the case should see the witnesses. There are already powers which enable the court to allow facts to be proved by affidavit or before an examiner in special circumstances, and we do not recommend their extension. This suggestion received no substantial support, and we cannot recommend its adoption.

94. (*f*) *Courts of Summary Jurisdiction.*—The suggestion that these courts should have divorce jurisdiction comes from those whose experience is chiefly derived from those courts, and who are possibly apt to take an exaggerated view of the capacities and importance of such courts. We do not believe that this suggestion will meet with any general approval, and we are unable to recommend its adoption, whether the court consists of a stipendiary magistrate, or of two or more justices of the peace; and, indeed, we propose certain limitations upon the powers at present possessed by such courts, which will be stated under Questions III. and IV. (pp. 66 and 70). Such courts are not suitable for the exercise of divorce jurisdiction; their staffs, as a rule, are not sufficient for divorce procedure and have little or no experience in civil business, their procedure is summary, and, partly by reason of this and partly by reason of their cheapness, they are resorted to by the poorer classes, with little previous consideration or reflection. In addition, so far as stipendiary magistrates are concerned, at any rate outside the metropolitan area in which may be included East and West Ham, there are too few to be of much assistance. There are only 19 outside the metropolitan area and those are stationed in eight counties, so that there is a large part of England and Wales without any stipendiary magistrate. As to other courts of summary jurisdiction, the gentlemen, who constitute them, change from week to week, and are, for the most part, without legal training.

We think, too, it is desirable, if courts of summary jurisdiction retain any powers of granting separation orders, that the jurisdiction in divorce should be exercised by a different tribunal from that granting separation orders.

95. (*g*) *County Courts.*—The suggestion that these courts should have divorce jurisdiction is supported by an influential body of evidence. In its favour will be found many witnesses of experience. On 3rd May, 1910, the Association of County Court Registrars passed a resolution "that in the event of jurisdiction in divorce " being extended, it should be conferred on county courts," (Vol. II., p. 370.) The suggestion is favoured by most of the large body of solicitors, who have experience of the working of all branches of the courts. It is thus favoured, because of the great convenience which these courts afford to suitors, owing to the sittings being held at a large number of places throughout the country, also because the procedure is speedy, simple, and economical, and generally because these witnesses consider that these courts are suited to the needs of those who resort to them, and are competent to deal with the suggested additional jurisdiction.

96. On the other hand, there are objectors to this suggestion. Their main grounds are that divorce ought not to be made too easy, and that to give the county courts jurisdiction would have this effect; that uniformity of decision is desirable, and would not be obtained, if the jurisdiction were entrusted to the county court judges, who number 55; and that there would be more opportunity for collusion, than if the trial of cases were confined to London. We proceed to consider these objections.

97. The phrase "divorce should not be made too easy" was not infrequently used before us, and it is necessary to understand exactly what it means. If it means that proceedings in divorce should not be too cheap, we agree that the claim to

a divorce must be treated as a very serious matter, and should not be made the subject of summary jurisdiction, originating with a summons costing, say, 2*s.* and ending with a hearing, the fee for which is another 2*s.*, like a summons, say, for maintenance before a magistrate. Such a procedure would lead to hasty and ill-considered applications, as is the case with applications to the magistrates and justices. But, if the expression means that the cost of divorce proceedings is not to be reduced so as to enable the poorer classes to bring their cases before the court in a reasonable and satisfactory manner and with due deliberation, the objection simply means that the administration of the law will remain the privilege of those with means to proceed in London. The poor would continue to be excluded from the benefit of the law, as indeed some maintain they ought to be, on grounds with which we have dealt elsewhere. The expression is by some, perhaps, intended to refer to alterations as to the grounds of divorce. These we deal with under Question VI. (p. 90). At present we are considering administration of the law, whatever the law may be.

98. Next, with regard to want of uniformity of decision—some practitioners in divorce cases appear to consider the divorce law one of great difficulty. It is perhaps not unnatural that those, who are closely connected with any particular professional practice, should over-estimate its difficulty. But, in the administration of the divorce law, the great mass of the work is the settlement of pure issues of fact, *e.g.*, whether there has been adultery or cruelty, or desertion. A perusal of the reports of cases in the courts will show that there are only occasionally difficult questions of law, as, for instance, those which depend on some branch of international law, or the extent of the court's jurisdiction, or matters subsequent to decree, such as variation of settlements. The Law Reports show that the matrimonial cases in the Court of Appeal in a year are few, and are almost entirely on legal points, such as those just mentioned.

The only difficulty, with regard to want of uniformity, to which witnesses seemed to attach real importance, was in connection with the term cruelty. We consider this term more fully under Questions III. and VI. (pp. 66 and 90), and here only observe that, if there be any difficulty under this head, it may be avoided by a clear statutory definition; that any tendency to strain the term, either by the court or by a jury, arises principally in cases where adultery is established and cruelty has also to be made out in order to found a decree of divorce; and that the abolition of the necessity for coupling any other cause with adultery would largely eliminate this tendency.

With regard to the suggestion of want of uniformity, it is to be observed that the Legislature has already entrusted the decision of charges of persistent cruelty, desertion, and even adultery as a defence, to the courts of summary jurisdiction, where there is a far larger field for want of uniformity than in the county courts. It is also to be observed that there would always be the right of appeal. Further, if this point should be thought to have the importance which the objectors, including the Bar Council, attach to it, we think it will be satisfactorily met by the proposals which we make as to the courts by which divorce jurisdiction should be administered.

99. The fear of collusion evidently bulks largely in the minds of many of the witnesses with regard to the cases brought before the divorce court, but the Earl of Desart, who was for nearly 15 years King's Proctor, stated (15,906) that he did not think that there is any objection to county courts from the King's Proctor's point of view, and the facts proved by him show that there is a great deal of exaggeration in this matter, as appears from the following passage in his evidence :—

> "15,995. (*Chairman.*) Are you able to tell us what proportion the cases in which you intervened on the ground of collusion alone bore to the cases in which you have intervened on the ground of misconduct on the part of the petitioner?—I could not give you it in the way you ask, but cases of collusion are very few—one or two a year. I could not tell you how many of the others."
>
> "15,996. The great cause for intervention is you find concealment on the part of the petitioner of his misconduct?—No, most of the collusion cases."
>
> "15,997. I was not on collusion. Is it the case that most of the cases are on the ground of misconduct of the petitioner which is kept back from the court?—That is the ordinary case."
>
> "15,998. Do you think that the cases of collusion between the parties are very numerous, if you have only had one or two in a year?—It is very speculative. We have a good many cases in which we suspect collusion and get no evidence, but our suspicions may be ill-founded. There is no doubt a certain proportion of cases in which collusion is suspected."

"15,999. Would one or two cases suggest much collusion?—That is about it. I think it works out hardly more than two. There might be three one year and one in another."

"16,000. In which collusion has taken place and you have intervened?—Yes."

"16,001. What is about the total interventions per annum, roughly?—I can give it to you in a minute. It varies in the last 10 years from 11, the lowest, to 33, the highest."

"16,002. The total number of interventions altogether is not very large?—No, but we inquire into an enormous number of cases; it varies from 306 to 631, but the actual interventions vary from 11 to 34 a year."

"16,003. In what number of years?—Fifteen years."

The figures given in the Civil Judicial Statistics for 1908, 1909, and 1910, pp. 27, 31, and 29 respectively, are as follows:—

Number of Decrees Nisi granted.

	Annual Average.			Intervention by Queen's (and since 1901 King's) Proctor.	Decrees reversed.
1858–1861.	Husbands petitions	86·25	141·25	1·25	·75
	Wives	55·00			
1862–1866.	Husbands	95·2	154·4	4·0	3·2
	Wives	59·2			
1867–1871.	Husbands	101·0	179·0	8·4	5·6
	Wives	78·0			
1872–1876.	Husbands	152·4	261·8	10·8	8·4
	Wives	109·4			
1877–1881.	Husbands	188·0	328·8	7·6	6·8
	Wives	140·8			
1882–1886.	Husbands	201·2	349·2	22·6	18·2
	Wives	148·0			
*1884–1888.	Husbands	208·2	364·4	24·4	19·0
	Wives	156·2			
1889–1893.	Husbands	210·6	365·6	24·0	21·6
	Wives	155·0			
1894–1898.	Husbands	—	472·8	17·4	14·2
	Wives	—			
1899–1903.	Husbands	351·0	568·4	21·0	17·2
	Wives	217·4			
1904–1908.	Husbands	354·6	635·4	27·6	24·2
	Wives	280·8			
1905–1909.	Husbands	360·6	645·6	27·4	24·4
	Wives	285·0			
1906–1910.	Husbands	349·6	638·6	25·8	23·4
	Wives	289·0			

* The want of sequence in the figures arises from the comparative tables in the Statistics having been prepared at different times.

Note.—The highest was in 1903, viz., 35.

The following figures give the population of England and Wales at intervals of 10 years since 1861:—

1861	20,066,224
1871	22,712,266
1881	25,974,439
1891	29,001,018
1901	32,526,075
1911	36,075,269

We may add that collusion is held to exist where the initiation of a suit for the dissolution of marriage is procured, or its conduct provided for, by agreement or bargain between the spouses or their agents. The mere fact that both spouses desire a divorce does not make them guilty of collusion, provided that they have not entered into any agreement obnoxious to the court; and collusion does not prevent a fresh suit (free from collusion) being afterwards brought.

100. We surmise that what is understood popularly by "collusion" is where the petitioner keeps back some fact which, if disclosed, would afford an answer to the petition. There seem to be more of these cases than there are of collusion in its proper sense, but even these are not numerous, and it is of great importance to bear in mind that concealment of facts is affected by the present state of the law under which the judge has not an adequate discretion in dealing with the facts of each case. If the law were placed upon a more reasonable footing as regards grounds of divorce and reasons for refusing it, there would not be the same temptation to conceal facts as there is now. If the law be too harsh, some people will not scruple to deceive the court, in order to be relieved from bondage.

101. We think it desirable to point out that concealment of the petitioner's own misconduct is assisted by the retention of section 3 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), that the petitioner cannot be required to answer any questions tending to show that he or she has been guilty of adultery, unless they have denied it; naturally, in proving a case against a respondent, nothing is said by the petitioner as to his or her own misconduct. This provision appears to have originated from the general principle that a person is not bound to answer questions which tend to incriminate himself or herself, and to have been handed down from days when adultery was a ground for excommunication. Excommunication and its consequences have now become mere matters of history, and adultery is not a criminal offence. The provision aforesaid should be abolished.

102. It seems probable that cases of actual agreement are extremely rare among the poor, and that, with regard to those in better circumstances, the cases in which there is any material likelihood of collusion by agreement probably arise in connection with the Act of 1884, which enables a party to prove desertion equivalent to two years' desertion by obtaining a decree of restitution of conjugal rights. This process is largely used where a husband has been guilty of adultery. His wife, notwithstanding this, writes a letter requiring his return, which he answers with a refusal, and thereupon she proceeds to enforce a suit of restitution, and on non-compliance with the decree she can proceed to obtain a divorce on the grounds of adultery and desertion (*see* the evidence of the late Sir George Lewis, 1444–52). If the sexes were on an equal footing, the first process would be unnecessary. We shall deal with this Act in considering amendments of the law.

103. We may further observe that the likelihood of collusion escaping detection if cases were heard locally, and not in London only, would be less in the case of local trials than it is at present, for the following reasons. The judge who hears a case has little or no opportunity of fully investigating it, where, as in undefended cases, only one side is heard. The petitioner often discloses nothing against himself or herself to his or her advisers, and only the case which has to be proved against the other side is presented. In very rare cases something in the documents or otherwise may arouse the suspicions of the judge, and he then may, if he think fit, direct that the attention of the King's Proctor be called to the case. The officials of the court have no means of knowing anything about the cases, especially those which come from the country. The King's Proctor does not watch the actual proceedings in London, but derives his information from inquiries made afterwards, often from communications addressed to him about the cases. If a procedure similar to that of the county courts were adopted, the position with regard to local hearings would be more favourable to detection of collusion or concealment than in the High Court in London. The proceedings in the former are usually served and attended to by the bailiffs of the court who have districts to look after, and, in order to appreciate the remarkable knowledge of these officials of their districts and the circumstances and conduct of the people who are parties to litigation, it is only necessary to attend sittings of county courts where judgment summonses are being taken. There would be little difficulty in these officials inquiring into the position and conduct of the parties to every divorce case in their locality, and reporting thereon to the court before or at the hearing. We may refer to the evidence of Mr. C. J. R. Tijou, the representative of the High Bailiffs' Association (2502–11, 2539–42), and Mr. G. A. Lightfoot (17,514).

104. We pass on to consider a further objection to the county courts, viz., that these courts are already sufficiently burdened with work, and that their work is increasing. Even if this is so, and if, on other grounds, it is desirable that such courts should have divorce jurisdiction, then clearly this point only indicates that an increase of staff may be necessary. But at present it is impossible to estimate whether the number of divorce cases would be such as to add very materially to the present duties of the courts, when such cases are divided amongst a number of judges. We think that the scheme which we propose affords means of sufficiently increasing the judicial force for the time being. When the number of additional cases is ascertained, the arrangements can be made more permanent without necessarily requiring further legislation, if adequate provision be made from the commencement for such appointments, whether temporary or permanent, as may prove necessary.

105. We consider that the principal objections made to the county courts having jurisdiction cannot be reasonably sustained, but there are certain grounds of objection which we think deserve to be taken into account.

106. In the first place, the difficulty of all the county court judges exercising divorce jurisdiction is greater, in consequence of greater numbers, than of all the King's Bench judges exercising such jurisdiction—some may be Roman Catholics or have objections to divorce.

Secondly, the gravity of divorce and other matrimonial cases, affecting as they do the family life, the status of the parties, the interests of their children, and the interest of the State in the moral and social well-being of its citizens, makes it desirable to provide, if possible, that, even for the poorest persons, these cases should be determined by the superior courts of the country assisted by the attendance of the Bar, which we regard as of high importance in divorce and matrimonial cases, both in the interests of the parties and in the public interest.

Thirdly, it is to be borne in mind that the county courts were originally established for the recovery of small debts, which still forms a considerable part of their work, though they have since been entrusted from time to time with multifarious duties, many of which are of an important character.

The general impression produced upon us by the evidence is that, although little importance need be attached to the suggestion that the poor would resent having their divorce cases heard in these courts, it would, in the estimation of a considerable section of the community, tend to a higher regard for the procedure and decision if those cases were before the highest tribunal—the High Court (*see* 14,416).

Fourthly, the constitution of county courts is not such as to make them in all respects suitable for the exercise of a jurisdiction, which is not confined to parties resident in this country. Their powers do not extend, and it is not reasonable that the powers of inferior courts should extend, to the issue of their process for service abroad. In divorce cases, especially, is this service needed. The cases are numerous, in which a married man or woman has departed from the country, and taken up residence in a colony or elsewhere abroad. There is no power at present for such courts to obtain evidence from abroad, which is frequently required even in very poor cases. This might be conferred, as was proposed by the Lord Chancellor's Committee, by the indirect means of an order of the High Court for the purpose, but it seems more suitable that the whole proceedings should, if possible, be in the High Court.

107. Apart from these details, it has to be remembered that frequently divorce cases involve the status of foreigners, who may have married either in this country or abroad, and are domiciled in this country. This is frequent where the cases arise between parties residing in London, or one of the other large cities to which foreigners resort. Jurisdiction, both in divorce and nullity cases, is not infrequently concerned with private international law, and, as decrees may have their effect in other countries, as a general principle they should be made by the High Court of the country of the suit.

108. The result is that, to meet the difficulties which arise in small cases from the cost and inconvenience of confining divorce and other matrimonial jurisdiction to a court in London, and also to meet any objections which may be made as to the exercise of this jurisdiction by an inferior court, it is important that the High Court should exercise this jurisdiction locally by judges of experience in the subject, with a simple, inexpensive and speedy procedure.

If district courts of the High Court were to be established, as has been frequently advocated by some law reformers, the problem might possibly be solved if the cost of

proceedings could be lessened, but this course has been objected to and has not been adopted. So long as the circuit system is maintained, district courts of the High Court will probably not be established.

Conclusion in favour of the High Court sitting and exercising Jurisdiction locally.

109. We have arrived after much deliberation at the conclusion that the problem may be solved in another way, by a combination of the High Court jurisdiction with the county court procedure, and we recommend that that course be adopted.

According to section 16 of the County Courts Act, 1888, any county court judge may be appointed a Commissioner of Assize, that is to say, at present any county court judge may be entrusted with High Court jurisdiction.

The objections to the county courts entertained by some very important witnesses, for instance, the Lord Chief Justice (15,501), Mr. Justice Bargrave Deane (1203-4), and by the Bar Council (11,968) would, as we understand their evidence, be minimised, if the jurisdiction were to be exercised by a limited number of county court judges, selected for the purpose. We refer especially on this point to the evidence of Lord Desart (16,008–14).

Since the Judicature Acts there have been established, at 89 convenient places in England and Wales, High Court registries in which common law actions may be brought, without the necessity for the interlocutory proceedings being in London.

In all these registries, with the exception, as we understand, of those at Liverpool, Manchester, Preston, and Ipswich, the same person is High Court district registrar and county court registrar; and this is of considerable importance in the working of a scheme which involves High Court jurisdiction with the assistance in service of proceedings and enforcement of process of officers of the county court. In the four places mentioned as exceptions, it will not be difficult to make special arrangements.

There are also registries of the Probate Division of the High Court at 40 places with different officials (except in two or three instances) from those in the High Court registries, but their duties are chiefly of an administrative order not concerned with litigation, and we therefore do not include them in these proposals.

110. We think that the country should be apportioned into districts, which might correspond with the present circuits of the High Court, and a metropolitan district, subject to such modifications as might prove convenient. Each of these districts would embrace several county court circuits. For each of these districts or combination of districts, we suggest the selection and appointment by the Lord Chancellor of one of the county court judges as a Commissioner in divorce and matrimonial cases, for, say, a year at a time, or more permanently, when the amount of work to be done has been ascertained; or the selection and appointment as such Commissioner of any person qualified to be a Commissioner of assize, so that, if necessary or desirable, the services of such person could be obtained for such time as may be required.

111. A Commissioner should take the whole of the divorce and matrimonial cases for his district. If he be a county court judge, until it is ascertained to what extent his presence is required—that is to say, how many cases there prove to be (which must for the present be uncertain)—his ordinary duties should be undertaken, if necessary, by a deputy paid by the Treasury. There are at present powers in certain cases to appoint deputies (*see* section 18 of County Court Act of 1888).

Only 8 Commissioners would be required, though possibly it would be found convenient to make the number 10, so as to permit of sittings in the metropolitan courts. If it were found necessary or convenient to have more than one Commissioner for a district, another might be added, and provision would have to be made to meet cases of absence of a Commissioner, through illness or other adequate cause.

The progress of the Commissioner round his district need not be more expensive, nor attended with much, if any, more formality than the progress of a county court judge to each of his courts at present, except the cost of travelling for longer distances and staying further from home. We suggest that the Commissioner, while he remained in office as such, should have all the powers of a High Court judge, and all the jurisdiction of the High Court of Justice in these cases, subject only to certain rules of practice which we will point to hereafter.

Places where Jurisdiction should be exercised.

112. The question then arises, at what places the jurisdiction should be exercised. The following Table shows the Assize Towns and the number of Assizes for civil business per annum, the District Registries of the High Court, and the places where Registrars have Bankruptcy and Admiralty jurisdiction:—

Northern Circuit.

County.	Assize Towns and Number of Assizes held per Annum for Civil Business.	District Registry of High Court.	Having Bankruptcy Jurisdiction.	Having Admiralty Jurisdiction.
Cumberland	Carlisle (2)	Carlisle	Carlisle.	
			Cockermouth.	
		Whitehaven and Millom.	Whitehaven and Millom.	Whitehaven and Millom.
Westmoreland	Appleby (2)	Kendal	Kendal.	
Lancashire	Lancaster (2)	Ulverstone and Barrow-in-Furness.	Ulverstone and Barrow-in-Furness.	Ulverstone and Barrow-in-Furness.
		Blackburn and Darwen.	Blackburn and Darwen.	Blackburn and Darwen.
		Preston	Preston	Preston.
			Bolton.	
			Oldham.	
			Rochdale.	
			Wigan.	
	Liverpool (4)	Liverpool	Liverpool	Liverpool.
			Salford.	
			Warrington.	
	Manchester (4)	Manchester	Manchester	Manchester.
			Ashton-under-Lyne.	
			Burnley.	

North-Eastern Circuit.

Durham	Durham (2)	Durham	Durham.	
		South Shields		
		Sunderland	Sunderland	Sunderland.
		West Hartlepool		West Hartlepool.
		Stockton-on-Tees	Stockton-on-Tees	Stockton-on-Tees.
Northumberland	Newcastle-on-Tyne (3).	Newcastle-on-Tyne	Newcastle-on-Tyne	Newcastle-on-Tyne.
Yorkshire		Bradford	Bradford.	
		Dewsbury	Dewsbury.	
		Halifax	Halifax.	
		Huddersfield	Huddersfield	
		Sheffield	Sheffield.	
	Leeds (4)	Leeds	Leeds.	
		Wakefield	Wakefield.	
			Middlesborough	Middlesborough.
			Northallerton.	
	York (2)	York	York.	
		Kingston-upon-Hull	Kingston-upon-Hull	Kingston-upon-Hull.
			Scarborough.	
		Barnsley	Barnsley.	

Midland Circuit.

County.	Assize Towns and Number of Assizes held per Annum for Civil Business.	District Registry of High Court.	Having Bankruptcy Jurisdiction.	Having Admiralty Jurisdiction.
Buckinghamshire	Aylesbury (2)	- - - -	Aylesbury.	
Bedfordshire	Bedford (2)	Bedford	Bedford. Luton.	
Northamptonshire	- - - - Northampton (2)	Peterborough Northampton	Peterborough. Northampton.	
Leicestershire	Leicester (2)	Leicester	Leicester.	
Rutlandshire	Oakham (2).			
Lincolnshire	- - - - Lincoln (2)	Boston Great Grimsby Lincoln	Boston Great Grimsby Lincoln.	Boston. Great Grimsby.
Derbyshire	- - - - Derby (2)	- - - - Derby and Long Eaton.	Chesterfield. Derby and Long Eaton.	
Nottinghamshire	Nottingham (2)	Nottingham	Nottingham.	
Warwickshire	- - - - Birmingham (3) Warwick (2)	Coventry Birmingham - - - -	Coventry. Birmingham. Warwick.	

Oxford Circuit.

Berkshire	- - - -	- - - -	Windsor and Maidenhead. Newbury.	
	Reading (2)	Reading	Reading.	
Oxfordshire	- - - -	- - - -	Banbury.	
	Oxford (2)	Oxford	Oxford.	
Worcestershire	- - - -	Dudley	Dudley. Kidderminster. Stourbridge.	
	Worcester (2)	Worcester	Worcester.	
Gloucestershire	- - - -	Cheltenham	Cheltenham.	
	Gloucester (2)	Gloucester	Gloucester	Gloucester
		Bristol	Bristol	Bristol.
Monmouthshire	- - - -	Newport	Newport	Newport
	Monmouth (2).		Tredegar.	
Herefordshire	Hereford (2)	Hereford	Hereford. Leominster.	
Shropshire	Shrewsbury (2)	Shrewsbury	Shrewsbury.	
Staffordshire	Stafford (2)	- - - -	Stafford. Burton-on-Trent.	
		Walsall	Walsall.	
		West Bromwich	West Bromwich.	
		Wolverhampton	Wolverhampton.	
		Hanley	Hanley. Stoke-on-Trent.	

North Wales and Chester Circuit.

County.	Assize Towns and Number of Assizes held per Annum for Civil Business.	District Registry of High Court.	Having Bankruptcy Jurisdiction.	Having Admiralty Jurisdiction.
Montgomeryshire -	Welshpool (1). Newtown (1) -	Newtown - -	Newtown.	
Merionethshire -	Dolgelly (2).			
Carnarvonshire -	- - - - -	Bangor - -	Bangor - -	Bangor.
	Carnarvon (2) -	Carnarvon.	Port Madoc.	
Anglesey - -	Beaumaris (2).			
Denbighshire - -	Ruthin (2).	Wrexham - -	Wrexham.	
Flintshire - -	Mold (2).			
Cheshire - -	- - -	Birkenhead - -	Birkenhead. Macclesfield. Nantwich and Crewe.	
		Stockport - -	Stockport.	
	Chester (3) - -	Chester - -	Chester - -	Chester.

South Wales Circuit.

Glamorganshire -	- - -	Cardiff - -	Cardiff - -	Cardiff.
			Aberdare and Mountain Ash.	
			Merthyr Tydfil.	
			Pontypridd.	
	Swansea (1) -	Swansea - -	Swansea - -	Swansea.
	Swansea or Cardiff (1).			
	Cardiff (1).			
			Neath and Aberavon.	
Carmarthenshire -	Carmarthen (2) -	Carmarthen - -	Carmarthen - -	Carmarthen.
Pembrokeshire -	Haverfordwest (2).	Pembroke Dock -	Pembroke Dock -	Pembroke Dock.
Cardiganshire -	Lampeter (2).	Aberystwyth -	Aberystwyth -	Aberystwyth.
Brecknockshire -	Brecon (2).			
Radnorshire - -	Presteign (2).			

Western Circuit.

Wiltshire - -	Devizes (1). Salisbury (1) -	- - -	Salisbury. Swindon.	
Dorsetshire - -	Dorchester (2) -	Dorchester - -	Dorchester - -	Dorchester.
		Poole - - -	Poole - - -	Poole.
Somerset - -	- - -	Bath - - -	Bath.	
			Frome.	
	Wells (1) - -	- - -	Wells.	
	Taunton (1) - -	Taunton - -	Taunton.	
			Yeovil.	
		Bridgwater - -	Bridgwater - -	Bridgwater.
Cornwall - -	Bodmin (2).			
		Truro - - -	Truro - - -	Truro.

Western Circuit—continued.

County.	Assize Towns and Number of Assizes held per Annum for Civil Business.	District Registry of High Court.	Having Bankruptcy Jurisdiction.	Having Admiralty Jurisdiction.
Devonshire	-	Barnstaple	Barnstaple	Barnstaple.
	Exeter (3)	Exeter	Exeter	Exeter.
		Plymouth and E. Stonehouse.	Plymouth and E. Stonehouse.	Plymouth and E. Stonehouse.
		Totnes	-	Totnes.
Hampshire	-	Newport (I. W.)	Newport (I. W.).	
		Portsmouth	Portsmouth	Portsmouth.
		Southampton	Southampton	Southampton.
	Winchester (2)	Winchester	Winchester.	
Bristol	Bristol (3)	(*See* for other particulars as in Gloucestershire.)		

South Eastern Circuit.

Huntingdon	Huntingdon (2).			
Cambridgeshire	Cambridge (2)	Cambridge	Cambridge.	
Suffolk	Bury St. Edmunds (1)			
	Bury St. Edmunds or Ipswich (1).	Bury St. Edmunds	Bury St. Edmunds.	
	Ipswich (1)	Ipswich	Ipswich	Ipswich.
		Lowestoft	-	Lowestoft.
Norfolk	-	King's Lynn	King's Lynn	King's Lynn.
	Norwich (2)	Norwich	Norwich.	
		Great Yarmouth	Great Yarmouth	Great Yarmouth.
Essex	Chelmsford (2)	-	Chelmsford.	
		Colchester and Clacton.	Colchester and Clacton.	Colchester and Clacton.
Hertfordshire	-	-	Barnet and St. Albans.	
	Hertford (2)	-	Hertford.	
Sussex	-	Brighton	Brighton	Brighton.
		Hastings	Hastings.	
	Lewes (3)	-	Lewes.	
Kent	-	-	Greenwich (Burney Street).	
	Maidstone (2)	Maidstone	Maidstone.	
			Tunbridge Wells.	
			Canterbury.	
		Dover	-	Dover.
		Ramsgate	-	Ramsgate.
		Rochester	Rochester	Rochester.
Surrey	-	-	Croydon.	
	Guildford (2)	-	Guildford and Godalming.	
			Kingston.	
			Wandsworth.	
Middlesex	-	-	Brentford.	
			Edmonton.	

There are—

61 places, at which assizes for civil business are held.

89 places, with High Court Registries. There are also certain additional places, as above shown, where Bankruptcy and Admiralty cases are heard.

559 places, at which county courts sit, not including the City of London.

113. Several alternatives present themselves for consideration; that the jurisdiction should be exercised—

(1) Only at places where assizes are held.

(2) At places where there is a High Court Registry, and such other places as may be appointed, as, for instance, where bankruptcy or admiralty jurisdiction is exercised.

(3) At every place where a county court is held.

An examination of the above table along with a map will show that to confine the places to assize towns would not, in certain parts, give sufficient convenience to suitors, and this is, no doubt, the reason why it has been found necessary to establish High Court Registries at places other than assize towns as well as at such towns.

On the other hand, to include every place where a county court sits would be undesirable for several reasons. The loss of time, the expense, and inconvenience of a special judge proceeding to every place where a county court is held would be great, and this plan could not well be adopted without giving jurisdiction to the county courts as such, a course to which there are objections, as we have above stated. Further, the officials at the small courts would not have the experience or practice, which those at more important registries will have. Lastly, the concentration at centres will be of advantage in the disposal of business and in enabling an adequate bar and others to attend the sittings with regularity and convenience. The witnesses are divided in opinion, but we think the weight of opinion favours the second alternative.

Some witnesses, who proposed that county courts should have divorce jurisdiction, and desired to have that jurisdiction exercised at every place where a county court sits, said that, if only selected centres are to be adopted, the poor will still be unable, in many cases, to reach them. We do not think that this would be so in the great centres of population, but there might be some difficulty with regard to the country parts. This, we think, could be very largely minimised by the procedure which we propose, as explained hereafter.

114. We have come to the conclusion that the scheme of selected centres should be adopted, and that this scheme will be the most suitable and convenient, and will give sufficient facilities to poor suitors, if our proposals as to practice and procedure be adopted.

115. We recommend that the sittings should be at each place where there is a High Court registry, and to meet any such difficulties as aforesaid, that the Lord Chancellor should have power to select and appoint any other place or places at which he should think sittings may be reasonably required; and registries should be established at such place or places, with the necessary powers.

116. With regard to the metropolis, we observe that the Lord Chancellor's Committee left cases arising in the area of the metropolitan county courts and in the home and near counties, where access to London is easy, to be dealt with by the present system of the High Court. We think, however, after considering the evidence which has been given before us, that all counties should be brought under the scheme which we recommend, and that the metropolitan area should be treated as a district to which the scheme should apply, and that certain of the courts should be selected as places at which sittings should be held, as convenience may require, and certain of the registries constituted, with the powers of High Court registries for the purpose. There seems to be no adequate reason in principle why cases in which the parties are poor should not be dealt with in the area aforesaid, in the same way as in the country districts.

PART XI.

Question II.—What should be the Extent of such Jurisdiction and what Procedure should be adopted?

(1) *Extent of Jurisdiction.*

117. If these proposals should be adopted, so that local jurisdiction be exercised, in the manner indicated, by the High Court, it would not in our opinion be desirable to place any statutory limitation upon the jurisdiction. As the scheme is not intended to make any greater changes in the exercise by the High Court of its

jurisdiction than such as are necessary in order to meet the justice of cases which under the present system cannot, by reason of cost and inconvenience, be conveniently brought and heard in the High Court in London, we propose that the actual exercise of local jurisdiction should be confined to such cases, and that it should be provided, by rules of court, that only cases within certain limits should be instituted and heard under the local jurisdiction. What those limits should be is a matter at present of some difficulty to determine; and experience of the working of the proposed system may be necessary before a clear conclusion can be reached. Many witnesses think that local hearings should be limited to cases arising between married persons whose income does not exceed 3*l.* per week, while others advocate a higher range of income. The jurisdiction proposed by the Lord Chancellor's Committee for county courts was limited "to cases in which the petitioner can satisfy the judge that his or "her whole assets after payment of debts are not worth, say, 50*l.*, and that the joint "incomes of the petitioner and respondent are less than, say, 150*l.* per annum"; and they added that the petitioner should be required to prove this by affidavits or other proper evidence, with satisfactory corroborative proof, and that it is necessary to insert the provision about income, because many people have little assets and yet a fair amount of income, and as regards a wife, she may have no assets but, whether petitioner or respondent, she may get security for her costs from her husband, which he can provide if he has adequate income. Bearing in mind the evidence as to cost given by many witnesses familiar with the subject which was not before the said Committee, we think it will be desirable that the limit should be a joint income of not more than 300*l.* per annum, with assets not more than 250*l.* We think that this would meet the needs of the great mass of people for whom fresh legislation is required.

The lower limits suggested by the said Committee seem to be too low to meet the difficulties which arise in many cases. When the financial difficulties of married persons with limited incomes, especially where there are children, are borne in mind, and when it is remembered that the husband has to provide the necessary costs for both sides, we do not think the limits we propose too high. There are probably a number of cases in which, although the property and income of the parties exceed the limits suggested by the said Committee, their actual financial position is such that they have little means for enforcing their rights, as, for instance, where debts have been incurred by the spouse whose misconduct is complained of and the petitioner is encumbered with the payment of them, or where a large family of children causes a heavy drain on the family resources, or where income has been charged, or is not yet available, or cannot be anticipated.

118. The rules should provide that the President or judge of the Divorce Division might, on the application of a party whose means were within the limits aforesaid, transfer a case proceeding in the principal registry to a local registry for hearing in the district, and further, that he or the District Commissioner, with his sanction, should have power on the application of a party, to order any case proceeding in a district registry to be transferred to the principal registry and to be heard at the central High Court in London, upon such terms as to security for costs and otherwise as may be thought fit. These powers would be exercised according to the necessities or importance of the case.

119. Our aim is to produce a system which will meet the needs of those who are unfortunate enough to require the assistance of the courts, and yet, except so far as necessary having regard to people's means and convenience, to continue the hearing of their cases before the central High Court.

Experience would rapidly show to what extent, if at all, it would be reasonably necessary to increase the general limits above proposed, and power to increase these limits as experience may dictate should be conferred as stated hereafter.

120. It will be observed that the rules would not limit the jurisdiction of the High Court sitting locally, but merely provide that, as a matter of practice, cases should only be brought into the local courts when within the limits aforesaid. If it should be found, at any time before decree absolute, that the limits had been exceeded, orders and decrees already made should not be invalid, but, in order to prevent the improper use of local courts, power should be given to the King's Proctor to intervene, if the limits aforesaid were found in fact to have been exceeded in any case, and upon such intervention, the President or judge of the said Division might confirm any orders and decrees or order the case to be re-heard before the central court. The

costs of such intervention should be borne by the petitioner, unless the President or judge of the said Division should for good cause otherwise order. And, if in the course of the proceedings, the District Commissioner found that the limits were exceeded, the case might by his order or that of the President or judge of the said Division, be transferred to the central court.

121. We think that the Statute which would be required to give effect to this Report should provide for the making of rules of court for the purpose of carrying out the proposals made, in which, in the first instance, the limits aforesaid should be specified subject to the provisions in the last paragraph, if the proposed limits of amount should be exceeded. But in order to prevent those limits being so fixed as to be incapable of change (except by statute), if experience should show that extension was reasonably necessary, we propose that power should be conferred upon the Rules Committee by Order in Council to alter the rules by increasing the said limits to the extent specified by the Order, and that without such Order no change should be made in the said limits.

122. The jurisdiction of the High Court sitting locally being unlimited, though the exercise of its jurisdiction should be restricted as aforesaid, it would be necessary to confine the exercise to such persons as ought properly to use the local court of their district. We suggest that a suit should only be commenced for local hearing in the court, whose area for proceedings covers the place where was the matrimonial residence of the husband and wife for a year before the last grievance complained of, or, in cases of desertion, for a year before the desertion commenced. Any case brought in a court, where it should not be brought, should be transferred, by order, to the right court or the central court, or be allowed to continue in the court where it was instituted, if a proper ground for so doing should be shown to exist, as, for instance, where a husband had left the country and the wife had gone to her parents in another district than that of the matrimonial home. Similar provisions as to intervention and costs thereof should be made.

(2) *Procedure to be adopted.*

123. We shall deal fully, under Question VII. (p. 129), with the amendment of procedure as regards pauper cases, and we think that the system which we suggest might be applied to proceedings in any district branch of the High Court. We think, however, that the effect of our proposals would be to reduce the cost of proceedings in the smaller class of cases so materially that it would be found that recourse to procedure *in formâ pauperis* would not be very extensively needed. With simplified proceedings, local hearings, and fees properly adjusted to meet the needs of the poor, it might be possible to place more limitation upon the right to proceed *in formâ pauperis* than is necessary in ordinary proceedings in the High Court.

124. We suggest under Question VII. (p. 126), the proper method of dealing with claims for damages.

125. The proceedings should be entitled in the High Court, and in the particular District Registry, and the district registrar should have all the powers of a registrar of the Divorce Division of the High Court. The interlocutory proceedings usually dealt with by a registrar should be dealt with by the district registrar, but all those steps, which are necessary with regard to the service of proceedings and enforcement of process, should be attended to by the bailiffs and other county court officials.

126. To facilitate proceedings by persons at a distance from the district registry, the proceedings (which should be commenced by a writ), might be commenced by the issue of the writ out of any county court registry in the district, and after service be brought into that registry and forwarded by the registrar to the central district registry. If there were no appearance, there is nothing more to be done until the hearing, notice of the date for which should be sent to the plaintiff. A very large percentage of cases would thus be dealt with. Appearances might be entered in the defended cases (probably not very numerous), either at the place of issue of writ, and notice thereof sent on to the central district registry, or in that registry.

127. There would thus be easy means within the reach of poor people of commencing and continuing their proceedings. The service would be effected by the bailiffs, as in ordinary county court procedure, and a certificate of service and identity

filed. The only difficulty is about the identity of the person served, but this arises in every kind of proceeding. In practice, we understand, no difficulty is found, even though the process of the county court in judgment summonses is served by the bailiffs, and defendants are committed thereon. Nor do we understand that any difficulty has been found with regard to service by the police of summonses under the Summary Jurisdiction Acts. If the bailiff does not know the parties or has not adequate means of himself identifying the party served, the identity would have to be established by some one who knows the party and accompanies the bailiff, and can prove the identity in the usual way, or leave might be given to the plaintiff to effect and prove service in the ordinary way of the High Court.

128. The principal preliminary interlocutory applications to the court in divorce cases are for leave to effect substituted service, and to dispense with co-respondents. These are made *ex parte*, and there should be no difficulty, if the affidavits, upon which they are made, were left at the registry in which the proceedings are commenced for transmission to the central district registry, to be laid before the commissioner. Having regard to the class of case which is likely to come before him, it is probable that in few cases would he need to have the application argued before him.

Contested applications for custody of children, &c. would be heard by the district commissioner: the advantage of a local system is the availability of the judge who would continually visit his district.

We should not propose that registrars, at any places except those fixed upon for the hearing of cases, should deal with any interlocutory applications usually dealt with by a registrar of the High Court. These should be disposed of by the registrar, upon whom the special powers are conferred.

129. We deal more particularly with points of procedure under Question VII. (p. 120). The procedure for the district courts would be similar to that in the central High Court, but special tables of fees and costs should be fixed, and provision made for the taking of a shorthand note of every case, as is done at present in the High Court.

130. To ensure uniformity of practice, and to prevent a case which had failed in one district being brought in another, we suggest that the papers in every case should, before the case is heard, be forwarded to the Principal Registry and be passed by the registrar there. This would be following the practice which is found necessary in the Divorce Court, where no case is brought to trial or for hearing without a certificate that the proceedings are in order. Any doubtful case could then be drawn to the attention of the President or judge of the High Court in the Divorce Division, who might order its transfer to the central High Court, and he should have the same power at any stage of the case and on any ground upon which he thought fit to act.

131. It would be desirable also to follow the Divorce Court practice of keeping minutes of the proceedings. It is very frequently necessary for the court to have the means of ascertaining from its own minutes what has happened in a case, especially as some orders, *e.g.*, for payment of money or custody of children, run on for years. Provisions as to these matters should be made by rules of court, and the rules could be altered from time to time as found necessary or expedient. Copies of the decree nisi and of any order as provided by rules of court should in all cases be sent to the Principal Registry to be recorded, so that there should be one central place of search, and when a case is ready for decree absolute the papers in it should be remitted to London, and all decrees absolute be pronounced by the High Court in London. This would not require the attendance either of parties or their solicitors; the London officials would see that the case was ready and fit for decree absolute, and the decree would then be made as of course.

132. Intervention by the King's Proctor, or by any one of the public (if this latter power be preserved), should be in London, and the proceedings would then be transferred to London, unless the President or judge of the High Court in London should order them to be continued, heard, and determined in the district.

133. The decisions of the District Commissioners should not have effect as binding precedents, as do judgments of judges in the High Court.

PART XII.

QUESTION III.—SHOULD ANY, AND, IF ANY, WHAT ALTERATIONS BE MADE WITH REGARD TO THE EXERCISE OF THE JURISDICTION CONFERRED BY THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, AND THE PROVISIONS OF THE LICENSING ACT, 1902, RELATING TO SEPARATIONS IN CASES OF HABITUAL DRUNKENNESS?

Present State of the Law and Statistics.

134. In order to give further protection to married women, with regard to their maintenance and safety, several Acts have been passed. In 1878, by 41 & 42 Vict. c. 19, sec. 4, it was provided that, if a husband should be convicted of an aggravated assault upon his wife, the court or magistrate before whom he should be so convicted might, if satisfied that the future safety of the wife would be in peril, order that the wife should be no longer bound to cohabit with her husband, and might order the husband to make weekly payments to his wife in accordance with his and her means, and might vary the amount on the application of either party in case of alteration of means, and might give her the custody of any children of the marriage under the age of 10 years, but no order for payment of money by the husband or custody of children by the wife, was to be made in favour of a wife who should be proved to have committed adultery, unless such adultery had been condoned, and any such order might be discharged, upon proof that the wife had, since the making thereof, been guilty of adultery.

In 1886, further powers were conferred upon the magistrates, by 49 & 50 Vict. c 52, which gave two justices in petty sessions, or any stipendiary magistrate, if satisfied that a husband, being able wholly or in part to maintain his wife or his wife and family, had wilfully refused or neglected so to do, and had deserted his wife, power to order him to pay to her weekly sums not exceeding 2*l.*, in accordance with his and her means, and to vary the amount on the application of either party in case of alteration of means, and to repeal the order at the instance of the husband at any time, and confirm, discharge, or vary any previous order thereon. The Act also contained a provision similar to that of the Act of 1878 as to an adulterous wife.

135. The said 4th section of the Act of 1878 and the Act of 1886 were repealed by the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), according to which (section 4) any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of section 43 of the Offences Against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than 5*l.* or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, (or where she is entitled to apply on the ground of the conviction of her husband upon indictment, to the court before whom her husband has been convicted) for an order or orders under the Act. And, by section 5, the court may make an order or orders, containing all or any of the following provisions:—

(*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty);

(*b*) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of 16 years, be committed to the applicant;

(*c*) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding 2*l.* as the court shall, having regard to the means both of the husband and wife, consider reasonable;

(*d*) A provision for payment by the applicant or husband, or both of them, of the costs of the court, and such reasonable costs of either of the parties as the court may think fit.

The further sections of the Act deal with limitations on the powers of the court, the powers of the court to vary or discharge orders, procedure and enforcement of orders for payment of money, &c.

136. In addition to these powers the Licensing Act of 1902 (2 Edw. VII. c. 28), s. 5, gave powers both to a husband and a wife of applying for an order under the said Act of 1895, in case the respondent is an habitual drunkard as defined by section 3 of the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), and the court may make an order containing provisions (*mutatis mutandis*) similar to those above mentioned and may, instead of making an order for non-cohabitation against a wife, with her consent, order her to be committed to and detained in any retreat licensed under the Inebriates Acts, 1879 to 1900, the licensee of which is willing to receive her; and such order shall have effect as if she had been admitted to the retreat under section 10 of the Habitual Drunkards Act, 1879, as amended by any subsequent enactment, and the court may order an officer of the court or a constable to remove her to the retreat accordingly.

The definition of "habitual drunkard" as given in section 3 of the said Act of 1879 is as follows: "'Habitual drunkard' means a person who, not being amenable "to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate "drinking of intoxicating liquor, at times dangerous to himself or herself or to "others, or incapable of managing himself or herself, and his or her affairs."

137. There is no report in Hansard of any discussion of the Bill which became the Act of 1895, and it may be doubted whether the effect of its provisions were adequately appreciated at the time it was passed.

138. The following statistics show the great extent to which the Act of 1895 is now used. The numbers of the orders granted under the Act of 1902 to husbands are shown, but those granted to wives under that Act are not shown separately. They are included in the total numbers of orders granted to wives.

Separation Orders.

	1907.	1908.	1909.
Orders granted to wives—			
With provision for payment of alimony - - -	6,559	6,535	4,794
Without such provision - - - - - -	175	162	215
Total to wives - - - - -	6,734	6,697	5,009
Orders granted to husbands—			
With provision for payment of alimony to wife - -	269	278	213
Without such provision - - - - - -	4	11	5
Total to husbands - - - - -	273	289	218
Total separation orders granted - -	7,007	6,986	5,227

Maintenance Orders.

	1907.	1908.	1909.
Total maintenance orders granted without provision for non-cohabitation.	547	901	2,014
Total separation orders granted to wives and husbands containing provision for payment of alimony.	6,828	6,813	5,007
Total orders containing provision for payment of alimony.	7,375	7,714	7,021

In consequence of a question raised by one of the witnesses as to the correctness of some of the returns to the Home Office upon which the published statistics were based, that Office caused fresh returns to be made for the years mentioned in the above tables, and Mr. Ernest Edward Stringer, one of the officials of the Office, was appointed to examine the returns. The results of an examination made by him are given in the tables. There is a slight difference between the figures in the tables for 1907 and 1908 and those given for the same years in the Judicial Statistics, but the difference is immaterial for present purposes. The statistics published for 1909 agree as regards the above figures 5,227 for separation orders, but we understand that the orders for maintenance only or separation with maintenance appear as 7,120 instead of the above figure of 7,021.

Tables of statistics of separations, including magistrates' separations and private deeds, in England and Wales and certain other countries were put in by Mr. R. T. Gates (Vol. I., p. 217). These show a much larger average, in proportion to the population in England and Wales, than in those other countries, but the figures for England and Wales may include cases in which maintenance only was ordered, and they do not show what numbers returned to cohabitation.

Observations on the Acts and the administration of the Law.

139. The Act of 1895 consolidated and extended the two previous Acts, and a noticeable feature is that, whereas the Act of 1886 did not give the courts of summary jurisdiction power to make orders for non-cohabitation in cases of desertion where the principal need is provision for maintenance, the Act of 1895 gave the further power to make a non-cohabitation order, as if what was needed were protection as well as maintenance. It is of importance to appreciate this at the outset of the consideration of Question III., because, for some 10 or 11 years, it was a matter of common form for the order made on the wife's application to contain the provision against cohabitation, as well as the provision for maintenance, whether the case was one in which protection was needed or not. It was not until it was pointed out in the case of *Dodd* v. *Dodd* (L.R. 1906, P. 189), approved by the full Court of Appeal in *Harriman* v. *Harriman* (L.R. 1909, P. 123), that the magistrates had a discretion as to whether the order should or should not include a provision against cohabitation that a change began to be made by leaving out that provision, in cases where all that was really needed was a provision for maintenance. In the above table, the change will be noticed. There is a large diminution of the orders for non-cohabitation, and a large increase in the orders in which a provision for maintenance only is made.

140. We have already dealt with the objection to giving jurisdiction in divorce cases to Courts of Summary Jurisdiction, and we should have been glad if we could have recommended that the whole of the jurisdiction, at present exercised by these courts, should be transferred to a superior court.

It cannot be considered satisfactory that a court of summary jurisdiction should have power to make orders, which may separate married persons for the rest of their lives. Such orders require, in our judgment, the deliberate consideration of a superior court. The ready opportunity for applications for orders of this character to a court of summary jurisdiction is undoubtedly likely to lead to hasty and ill-considered action by the applicants.

The evidence, which has been laid before us, demonstrates that this result follows; for we find that a very large percentage of the persons separated by such orders become reconciled afterwards, within a short time, largely through pressure caused by the increased cost of living separately: by some witnesses this percentage is placed as high as 50 and even, in some instances, as high as 75.

Again, the courts of summary jurisdiction are, with the exception of the few metropolitan and stipendiary magistrates' courts already mentioned, the ordinary petty sessional courts presided over by magistrates who, although they may in some instances be lawyers by profession, are, in general, laymen possessed of no legal training or qualifications, assisted by a clerk, who may or may not be a competent solicitor or clerk.

Moreover, these courts form part of the judicial system for administering the criminal law in the case of petty offences. We think there is a serious objection to a court, whose main duties are of a criminal character, entertaining applications,

which are of a civil nature, concerning the domestic relations of men and women and their children, applications which, if granted, may produce the practical although not the legal dissolution of the marriage tie.

141. The evidence satisfies us that the general administration of the Acts is not satisfactory, where these cases are dealt with by lay magistrates. Although, in some parts of the country, this may not be the case, owing to special arrangements for hearing the cases before a bench sitting regularly on such applications, in others we are informed that orders are made too easily and on too slender materials, and in others are too difficult to obtain. To some extent the provisions of the Acts may be to blame for these results, because they contain no power to make a temporary order for non-cohabitation, and, therefore, although it may be that all that is required is an order affording temporary protection and time for reflection, all that can be done is to make a full order, or adjourn the case, without any power to make provision for the maintenance of wife and children, in the meantime. We feel, after the voluminous evidence which we have taken from all parts of the country, that it is not right to leave the administration of powers, which may produce the practical though not the legal dissolution of the tie of marriage, to courts whose duties and experience are mainly confined to dealing with petty offences.

142. The question of the effect of permanent separation between husband and wife, without divorce, will be more fully considered under Question VI. (p. 91), and we need here only state that, where it has been effected by these separation orders, its consequences are in many cases disastrous; in the case of men, leading in numerous instances to adulterous connections and general immorality, and in the case of women, but to a lesser extent, to the same results.

143. We consider that the power of the courts of summary jurisdiction to make orders, which have the permanent effect of a decree of judicial separation, should be abolished.

144. But although separation orders have many disadvantages and lead to irregular connections being formed, and although in many cases their economic consequences are bad both for husband and wife and children, still they are to some extent necessary for the purposes of protection; they are at present the only remedy within the reach of the very poor, and they have been made use of by ill-treated wives for many years.

We think, for these reasons and also because these orders afford a remedy for Roman Catholics and persons disapproving of divorce, that they cannot now be altogether abolished, and our conclusion is that the jurisdiction of courts of summary jurisdiction to grant separation orders and maintenance orders should be preserved, but that the exercise of the jurisdiction should be limited, as we shall indicate.

145. The proper principle to apply to such courts is that their orders should only be granted where they are necessary for the reasonable immediate protection of the wife or husband, or the support of the wife and the children with her, and that if it is or becomes necessary for the parties to be permanently separated, application for that purpose should be made to the superior court by a simple process, in the manner we shall specify. We believe that the jurisdiction so limited would be adequate to meet all the necessities which exist, and would leave few cases in which an application for permanent separation to the superior court would be necessary for the class of people to whom the Act mainly applies, except those cases in which the applicant was entitled to claim, and desired to claim, a divorce.

146. Under the Act of 1895, a wife can apply for an order, but a husband cannot, and, in the case of some of the offences, there may be as much reason for making an order on a husband's application, as there would be if the offence were by the husband, and the application by the wife. We deal with this in the answer to the next question, and here merely state that we consider the Act should be made to apply to applications by the husband in proper cases.

147. The jurisdiction under the Act of 1902 should, we think, be maintained, but limited to a period as hereinafter stated, leaving the superior court to make an order of a permanent character, if necessary. We base this upon the same principles as those we have already indicated with regard to the Act of 1895.

148. The Acts of 1895 and 1902 have a practical limitation in this, that the court has only power to order maintenance to a wife not exceeding the weekly sum of 2*l.*, and the result is to confine the operation of these Acts almost entirely to the poorer classes. There may well be cases fit for the superior court in which the limit aforesaid may be exceeded, and we think it ought to be provided that the High Court should have powers corresponding to those of the courts of summary jurisdiction, but without limitations of amount of maintenance. At present, a court of summary jurisdiction may refuse an order in cases more fit for the High Court, but that court cannot deal with some of the cases, which may be brought before a court of summary jurisdiction, as, for instance, cases under the Act of 1902. (*See* section 10 of the Act of 1895.)

PART XIII.

QUESTION IV.—ARE ANY, AND, IF ANY, WHAT AMENDMENTS OF THE SAID ACTS OF 1895 AND 1902, AND OF THE PROCEDURE AND PRACTICE THEREUNDER DESIRABLE?

149. A study of the Acts, assisted as we have been by the evidence given before us with regard to numerous points to which our attention has been drawn, has led us to the conclusion that these Acts, and the procedure and practice thereunder, require amendment in many respects, which we now proceed to enumerate and consider.

Amendments as to Grounds on which Orders may be made.

150. From section 4 of the Act of 1895 it will be observed that the grounds, upon which an order may be made in favour of a wife, are—

(1) Conviction of husband summarily of an aggravated assault upon her.

(2) Conviction of husband upon indictment of an assault upon her, with sentence to pay a fine of more than 5*l.* or to a term of imprisonment exceeding two months.

(3) Desertion by the husband.

(4) Persistent cruelty to her by husband.

(5) Wilful neglect of husband to provide reasonable maintenance for her, or her infant children, whom he is legally bound to maintain.

In (4) and (5) the cruelty or neglect must have caused the wife to leave and live separately from her husband.

151. The words "persistent cruelty" without any definition have given rise to difficulty and diversity of view. As to (1) and (2) it should not be the mere fact of conviction which should be a ground for a separation order, but the fact, if it be the case, of the wife being unable to live safely with her husband, though proof of the conviction would generally establish the want of safety.

152. Many witnesses have pointed out that the condition attached to (4) and (5) gives rise to great difficulty and inconvenience and ought to be dispensed with. If a man be guilty of cruelty to his wife, or of neglect to maintain her and the children, she cannot obtain an order, without leaving the house, which, in many cases, she ought not to be compelled to do. For example, she may be carrying on a small trade or business or work of some kind in the house in which she lives with her husband, or for other reasons she may be desirous of continuing to live in the marital home. Protection against cruelty and neglect to maintain is required and should be given to her, without enacting the condition that she should abandon her home.

In our opinion, the condition should be dispensed with.

153. It was suggested by certain of the witnesses that adultery should be added as a ground upon which an order might be made. We are, however, of opinion that this ground does not fall within the principle upon which, as already stated, courts of summary jurisdiction should act, and that this offence, whether as a ground of separation or divorce, should be dealt with by the court having jurisdiction in divorce.

154. We recommend that the Acts should be amended, so that the grounds upon which orders may be made shall be the following:—

(*a*) Cruelty by the respondent to the applicant.
(*b*) Habitual drunkenness on the part of the respondent.
(*c*) Wilful desertion by the respondent of the applicant, without the consent or against the will of the applicant, and without reasonable cause.
(*d*) Neglect by the husband to provide reasonable maintenance for the wife, or her infant children, whom he is legally liable to maintain.

Definition of "Cruelty."

155. With regard to cruelty—this should be clearly defined by the Act, so as to remove, as far as possible, all difficulties as to its meaning. It was said that in the High Court, where cruelty is a ground for judicial separation, and one of the grounds which may be coupled with adultery in order that a wife may obtain a divorce, there has not been uniformity of view as to the meaning of cruelty on the part of either judges or juries. To some extent this may be the case, though the extent has, we think, been exaggerated by the witnesses. But some variety is not unnatural, when changes of social life take place, and when the word has to be applied to cases in different ranks of life, and when no definition is to be found in the Statutes. A clear definition is, however, to be found in the judgments in the Court of Appeal and House of Lords in the case of *Russell* v. *Russell* (L.R. 1895, P. 315; 1897 A.C. 395), and, with this in mind, we suggest that the amended statute should contain the following definition:—

> Cruelty is such conduct by one married person to the other party to the marriage as makes it unsafe, having regard to the risk of life, limb, or health, bodily or mental, for the latter to continue to live with the former.

But, however this definition is expressed, it should include—

(1) Actual violence, and acts of a physical character.
(2) Grave insults and offensive conduct, though not amounting to actual physical violence.
(3) Drunkenness.

The evidence required should be such as to satisfy the tribunal that, having regard to the risk aforesaid, it was no longer reasonably safe for the applicant to reside with the respondent, and, without being so satisfied, the tribunal should not find cruelty.

The definition should also include the following acts, and proof of either of them should be sufficient proof of cruelty as defined:—

(1) That the respondent has knowingly, or negligently, infected the applicant with venereal disease.
(2) That a respondent husband has compelled his wife to submit herself to prostitution.

The risk mentioned in the definition aforesaid should, we think, be inferred in these two classes of case from proof of the act. At present, it is more than doubtful whether such offences are covered by the words "persistent cruelty"; the first case is sadly common, and the second is a horrible form of criminal offence which, according to some of the evidence, takes place more frequently than is generally known. We shall revert to this subject under Question VI. (p. 99).

Definition of "Habitual Drunkard."

156. With regard to the term "habitual drunkard"—it was suggested in the evidence that the definition above given (p. 67) is unsatisfactory.

Dr. Branthwaite, His Majesty's Inspector for England and Wales under the Inebriates Act, stated that this definition has proved very unsatisfactory in many ways, and that the defects have been admitted and discussed by a Departmental Committee appointed to inquire into the operation of the law relating to inebriates in England in 1908, and by a similar committee appointed by the Secretary for Scotland in 1909. He gives (41,302) the definition suggested by the English Committee, and an alternative definition suggested by the Scottish Committee, but he recommends a further definition as follows:—

> "An inebriate means a person who habitually takes or uses any intoxicants, and while under the influence of such intoxicants or in consequence of the effects thereof is at times (*a*) dangerous to himself, or dangerous or a cause of terror to

others; or (*b*) a cause of serious harm or suffering to members of his family or others; or (*c*) incapable of managing himself or his affairs. (The expression 'intoxicant' to be understood to include any intoxicant liquor, or sedative, narcotic, or stimulating drug or preparation.)"

Dr. Branthwaite points out that this definition does not vary greatly from the other two, but seems to him to remove some of the objections to both. Although his definition may be open to some criticism (*see* 41,303–8), we consider it will be difficult to frame a better one, and that it should be adopted.

It is said by some that the term need not be defined, but we think that having no definition is leaving too much discretion to a court of summary jurisdiction.

If the drunkenness is not such as to make the offender a habitual drunkard within the definition, yet it may be such and so frequent as to make the married life intolerable, and to lead to the reasonable conclusion that there is the risk above stated if the applicant continue to live with the respondent. Such drunkenness should come under the head of cruelty. Whether the drunkenness be habitual within the meaning aforesaid of that term, or only such as last mentioned, it should be an answer to the application founded on it that it has been materially conduced to by the applicant.

Desertion.

157. Desertion is not an offence under the Act of 1857, if the leaving is with reasonable cause, and although there is no reference to reasonable cause in the Act of 1895, the same principle should apply. It does not seem necessary or advisable that a statutory definition of "reasonable cause" should be given, as it is impossible to anticipate all the cases which may occur; a marital offence for which a separation order or decree could be obtained would be reasonable cause, and other cases have been the subject of judicial decision: *See* the cases of *Russell* v. *Russell*, (L.R. [1895], P. 315 C.A.); *Oldroyd* v. *Oldroyd* (L.R. [1896], P. 175); *Synge* v. *Synge* (L.R. [1900], P. 180; L.R. [1901], P. 317); *Mackenzie* v. *Mackenzie*, (L.R. [1895], A.C. 384 at p. 389); *Ousey* v. *Ousey* and *Atkinson*, (1874), (L.R. 3 P. & D. 223); *du Terreaux* v. *du Terreaux*, (1859), (1 Sw. and Tr. 555).

Relative Position of Men and Women.

158. Lastly, on this head of grounds on which orders may be made, it is convenient to consider the relative position of men and women. Orders under the Act of 1895 can only be obtained by women, but under the Act of 1902 either men or women can apply. We think it would be right to give the husband the same rights as a wife in cases of cruelty, as well as of habitual drunkenness, though in actual practice the cases in which he would require to put forward, and could make, a claim would probably be exceptional. We see no reason also why, if a wife deserts her husband, or will not help to maintain him, and has means, and he has no means of livelihood (for example in the case of an invalid), an order for maintenance should not be made against her.

Amendments as to—

Form and duration of order, &c.

159. A material distinction exists between cases in which the applicant requires protection, whether with or without maintenance, or only needs provision for maintenance. The distinction was observed in the Acts of 1878 and 1886, but was not made sufficiently clear in the Act of 1895, with the results already stated, until after the two cases above mentioned (p. 68).

The proper remedy where protection is needed is a separation order, but, where maintenance is all that is necessary, the order should be one for payment of money. Cases of cruelty and habitual drunkenness fall within the former category: those of desertion and neglect to maintain within the latter.

160. With regard to the first of these two classes, we think the proper order is that the applicant be no longer bound to cohabit with the respondent (which provision, while in force, shall have the effect in all respects of a decree of judicial separation by the High Court), with the other necessary provisions as to custody of children, alimony, and costs.

But, in addition to the existing powers of varying, altering, or discharging orders, there should be a power to review a separation order, on the application of either party. The party obtaining the order should be permitted to apply at any time, but, in order to prevent oppression, the party against whom the order was made should only be allowed to apply at the expiration of six months from the date of the order, unless the court on an *ex parte* application give leave to apply within that time. Upon such review, the court should have power to vary, or discharge, or continue the order. Similar powers of fresh application might be given, dating from the order of review. These provisions would enable a respondent to satisfy the court that his or her conduct, since the order or last order, had been such that the applicant ought to give the respondent another chance.

161. Our view is that the Acts at present do not give the court sufficient discretionary powers; that the orders to be made by a court of summary jurisdiction should not be of a permanent character; that the jurisdiction should be exercised with the object, so far as possible, of reformation and not of separation, with all its possible evil consequences; and that it has been demonstrated, by the evidence as to the large percentage of reconciliations which take place after orders, that what is mostly needed is a suitable means of enforcing temporary separation where it is necessary, with more control by the court over the people for whom this jurisdiction exists than it possesses at present. People who are well-to-do are able to consult solicitors, counsel, and friends of experience before they determine to embark on matrimonial causes, and only do so as a rule with deliberation, but the poorer classes have not these advantages, and the applications to the magistrates are often made without consideration, in fits of temper, and with no due appreciation of the gravity of the action. The summons is often refused, and, when granted, is often dropped, and, when heard, is often rejected.

If the procedure which we suggest should fail in its object and a permanent order become necessary, it should be left to the superior court to make such order, either for judicial separation or for divorce, if the case is one in which there are grounds for divorce, and that remedy be claimed.

The powers of courts of summary jurisdiction in these matrimonial matters should, in our view, be rather of a disciplinary character than such as to enable them to decide finally as to the status of married persons.

162. For the reasons which we have given, we are of opinion that no separation order of such courts should be continued for a period of more than two years from the date of the original order separating the parties, at the expiration of which time the order and continuing order or orders, if any, should determine, unless, before such expiration, the party obtaining the original order apply to the High Court to deal further with the matter, in which case the order should run on till the High Court has dealt with it. Such application might be made by lodging the order, or a certified copy, with the High Court, and serving a notice on the respondent of an application to have the order converted into a decree of judicial separation or of divorce, and, upon such application, the court would deal with the matter, as if a suit had been commenced, and should be at liberty to proceed either on the notes of the hearing before the court of summary jurisdiction, or upon further evidence, as it thought fit. We have fixed upon the period of two years, partly because that period gives ample time for the exercise of the magistrates' powers to produce its effect (a large proportion of the orders would probably not last so long), and partly because it might tend to prevent hasty applications being made to the High Court, for it must be remembered that the magistrates' order would not be a bar to proceedings in the High Court at any time. If the proposals already made as to local hearings by the High Court be adopted, there would be no hardship in those cases, where a permanent order became necessary, being thus passed on to the High Court.

163. If, on an application for an order, or to review, discharge, or continue an order, the court of summary jurisdiction considered that the case was one which should be dealt with at once by the High Court, it should have power to remit the proceedings to the High Court. Section 10 of the Act of 1895 requires amendment. Instead of refusing to deal with a case on the ground that it is a fit case for the High Court, there should be power to send the proceedings forthwith to the High Court, and power should be conferred upon the High Court to dispose of them, as if they had been originally commenced before it. This power should apply, whether the case is for separation, or only for maintenance.

164. Some witnesses have suggested that a return to cohabitation should not put an end to a separation or maintenance order: *See* the evidence of W. Fitzsimmons (19,517–21), G. B. C. Yarborough (21,090), and J. G. Silcock (22,307). We think, however, that a return to cohabitation should have the effect of determining a separation order. If the order were allowed to remain operative after a return to cohabitation, a wife would be enabled to leave her husband when and as often as she liked, sometimes without any reasonable cause, and then proceed against him for non-payment under the order. In the case of *Matthews* v. *Matthews* (28, Times Law Reports, p. 421), the majority of the court expressed the opinion that the order runs on notwithstanding resumption of cohabitation, until application is made under section 7 of the Act of 1895, to have it cancelled, but, in effect, this will probably mean that the order will run on indefinitely. We understand that such an application is seldom made; the order is allowed to lapse without any application for discharge.

A suggestion was made by Mr. W. Fitzsimmons (19,520), that the order should not come to an end until three months after resumption of cohabitation, but even so it would still be necessary to apply again to continue it, if cause for so doing arose. On the whole, we think it simpler and more satisfactory, where cohabitation has been in fact resumed after a separation order, to leave any further misconduct for a fresh application.

165. Passing now to cases of desertion and neglect to maintain, we would point out that orders of separation are not the suitable remedy. In both these cases, all that is needed is an order for maintenance, and, if necessary, for the custody of the children, and no obstacle should be put in the way of the parties resuming, or continuing, cohabitation.

It would not be necessary to place any limit of time on the duration of such an order, but power should be given to the magistrates to revoke or vary it in amount, or otherwise, if there be sufficient cause for so doing. If a deserted wife unreasonably refused to receive back her husband (who *bonâ fide* desired to return to her) and to live with him, the power of revocation aforesaid could be used.

It was, however, suggested that without a separation order, a husband might force himself on a deserted wife, without any *bonâ fide* desire to continue to cohabit with her, but merely with the object of putting an end to the order, and then leaving her again. This could be effectively prevented, if the order were to run on, notwithstanding resumption of cohabitation, till notification to the court by the wife of the resumption of cohabitation, or until an order of revocation was obtained.

To guard against undue or unfair compulsion by the husband on the wife to surrender the order, it might be provided that the notification aforesaid should not operate to end the order, until the officer of the court, to whom we shall hereafter refer, certified that there was a *bonâ fide* resumption of cohabitation, and that a wife was not being improperly compelled to surrender the order which she had obtained. If it were sought to enforce the order for payment of money becoming due during a period of resumed cohabitation, the order still running on, the court should not enforce it for money due during such period, if the husband has maintained his wife during that period.

In cases of neglect to maintain, the husband might, or might not, be living in the same house as his wife if the change we have above suggested, viz., that she need not leave him before obtaining an order, be made, and therefore, the order should run on, till put an end to in the manner above indicated.

166. The difficulty, which arose in such cases as *Dodd* v. *Dodd* and *Harriman* v. *Harriman* (p. 68), is now obviated when the magistrates make an order for maintenance only, but, if the procedure we suggest were adopted, it could not arise, and as there would be no order to bar the resumption of cohabitation, desertion once begun would run on till put an end to by resumption of cohabitation or agreement. At present, if a separation order be made, desertion comes to an end, and although the respondent has deserted before the order, his continuing away after the order will not be considered as part of a period of desertion, which would, at the end of two years, give a right to proceed in the High Court for judicial separation, or for divorce, if there were also adultery.

These considerations, however, would not be so material if divorce could be obtained by a woman on the ground of adultery alone, though the change we suggest would still be of importance as to judicial separation after a period of desertion, or if such desertion were made a ground of divorce.

Further Amendments.

167. Some witnesses suggested that a larger amount of the husband's income should be given for the maintenance of the wife, that a greater or less amount of evidence of cruelty should suffice for an order, and that all cases should be remitted to probation officers in the first instance. These suggestions relate to the way in which justices should exercise any discretion they may have as to making orders, rather than to amendments, which can usefully be made by the Legislature.

168. There are, however, other amendments, either suggested by witnesses or by consideration of the Act and present procedure, which we think ought to be made :—

(*a*) Power should be given to adjourn a case for any time not exceeding three months and to make an order for maintenance in the meantime, when the application is for separation. This would give the parties full time for consideration, and would enable the probation officer, or police court missionary, to have an opportunity of exercising any influence he may possess.

(*b*) It would also be an advantage if in addition to or in lieu of an order for separation, justices were given power to bind over the husband, with or without securities, to be of good behaviour.

(*c*) (1) Maintenance money should be paid to an officer of the court, unless the wife expressly requests that it should be paid to her, or to some third person on her behalf. This exception would provide for cases where the wife is of a somewhat higher class than is usual in separation cases. With this exception, it should be imperative that the money should be paid to an officer of the court. That course would relieve the wife of many difficulties, would lead to payments being made more regularly, would remove disputes as to the amounts owing, and would prevent undue pressure being put upon the wife by the husband, in separation cases, with the view of improperly compelling her to return to cohabitation.

(2) "Officer of the court" should be defined so as to include "a superintendent "or inspector of police or other officer of police of equal or superior rank, "or in charge of any police station" (*see* Summary Jurisdiction Act, 1879, section 38), and any probation officer or police court missionary.

(3) A provision that the husband should give notice of any change of address to the officer of the court to whom the maintenance money is ordered to be paid, with a penalty in case of his failing to do so without reasonable excuse, would be useful. There is a similar provision in the Children Act, 1908, section 75 (6).

Defences.

169. Section 6 of the Act of 1895 is as follows :—

"No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery : Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery."

There appears to be an omission to provide for such causes as would be a defence to a suit for divorce or for judicial separation being good defences to an application for an order, whether for separation or maintenance. It would seem right to amend the Act in this respect, more especially if further causes for relief by divorce are introduced.

Discharge of Orders.

170. Section 7 of the said Act contains powers to vary and discharge an order, which should be extended as we have suggested. The last sentence of that section runs thus : "If any married woman upon whose application an order shall have been made "under this Act, or the Acts mentioned in the schedules hereto, or either of them, "shall voluntarily resume cohabitation with her husband, or shall commit an act of "adultery, such an order shall upon proof thereof be discharged." Some amendment

of section 7 of the said Act will be needed in consequence of the foregoing proposals, but, in addition, a distinct amendment is required, with regard to discharging an order on the ground of the wife's adultery since the date of the order.

It has been pointed out by some of the witnesses, that, if a married woman commit an act of adultery after an order, the court has no discretion as to whether or not the order should be discharged, and that there are cases in which a husband may connive at, or be guilty of conduct conducing to, such subsequent adultery in order to get rid of the order, as, for instance, by placing temptation in her way, or failing to pay the allowance ordered, and thus exposing her to temptation. To meet this point, we think that a proviso, similar to that in section 6 of the Act as to condonation, connivance, or conducing by wilful neglect or misconduct to the adultery, should be introduced with regard to an application for the discharge of an order under section 7.

Further, although an order be discharged, if it be discharged in such circumstances that the parties do not resume cohabitation, the court should still have power to provide for the custody and maintenance of the children, and to exercise a discretion according to the circumstances of each case, having regard to the best interests of the children, and even although there may have been some fault since the date of the order in the party to whose care they were originally committed.

If an order be discharged on the ground of the original applicant's fault, any arrears then due, which have accrued since the date of the fault on which the discharge is founded, should be cancelled. At present arrears only cease at the date of the order of discharge; and if, for instance, a woman has been living in adultery since the date of the order (a common case), without the respondent's knowledge, it is a hardship upon him if his obligation is not released as from the date of the misconduct, unless he has by non-payment of the money, or otherwise, conduced to the woman's fall.

Expenses and Enforcement of the Order.

171. In all cases of summons, whether on application for an order, or for the enforcement of an order, and in cases of warrants for the enforcement of an order where the husband is within the jurisdiction of the court issuing the warrant, there appears to be no practical difficulty as to fees or expenses. Such fees and expenses are very small, and the court has power to remit fees (14 & 15 Vict. c. 55. s. 12), and we understand the court does remit fees in proper cases. The fees and expenses are payable by a respondent husband, and are enforceable against him. It would seem that, if they cannot be recovered from him, they are technically payable by the applicant, but payment is not enforced.

It has been stated that the fees in different courts are not uniform. (*See* the evidence of Mr. Simpson, C.B., of the Home Office, 40,720 *et seq.*) We would suggest that the fees in the cases, which we are considering, should be placed upon a uniform basis, as was apparently contemplated by the establishment of a model table of fees in use at the Home Office, which, as far as we can gather from Mr. Simpson's evidence, has been adopted where the necessity for revision has arisen, but does not seem yet to have been applied to the tables which came into force before 1848.

When, however, a warrant for the arrest of a husband has to be executed, outside the district in which it was issued, a difficulty as to expense may arise; in some places the police do not execute such warrants, unless the wife provides the cost of bringing the husband back to the place at which the warrant was issued. (*See* Mr. Simpson's evidence, 40,759.)

172. It is perhaps outside the scope of this Commission, but we think the duties of the police, as to executing warrants outside their districts without requiring previous payment of expenses, should be more clearly specified. A recommendation of the Select Committee on Bastardy Orders, 1909, was made "that it should be made " clear that the police are bound to enforce warrants of distress or committal " outside their districts, without requiring the previous payment of costs." (*See* Report of the Committee, paragraph 11, on p. v.)

We understand that the police are bound to execute warrants within their districts, without requiring expenses to be previously paid; that they *may* execute warrants outside their districts, and charge the expenses on the police fund; but that

they *must* execute warrants outside their districts, without previous payment of expenses is, as we gather, not admitted by all chief constables. The difficulty usually arises in the case of warrants for semi-private claims. For instance, the police of Carlisle might object to execute a warrant for the arrest of a man in Penzance, who owes 2*l.* on a bastardy order, at a cost of 6*l.* or 7*l.*, and sometimes an objection is raised.

If all warrants, in the cases with which we are concerned, were executed within the district or outside the district in which the warrant is issued, without (if the court of summary jurisdiction so orders) demanding previously the cost of execution of the warrant, no difficulty in the way of a poor applicant would be felt.

173. It is possible, however, to lessen the cost of executing a warrant in a district outside that in which it is issued, if the suggestion made by some of the witnesses were adopted, namely, that the respondent might be dealt with, without the necessity of bringing him before the court to which the wife applies for process for non-payment of the maintenance money. (*See* the evidence of H. Gough, 3270 *et seq.* and 3333 *et seq.*, and of Major Pulteney Malcolm, 9854–6 and 9945 *et seq.*) There are, however, some practical difficulties in the way of this being done, which we think could be overcome in the following manner.

It would be possible, where the maintenance money has been ordered to be paid to an officer of the court, to send the warrant for the arrest of a husband to the place where the husband is staying, and, the warrant being backed there, for the husband to be brought before the court of summary jurisdiction at that place.

There might also be a provision that a declaration, under the hand of the said officer of the court, certifying (1) the date of the order, (2) that a copy of the order had been served on the husband, (3) the amount owing under the order, (4) the dates and results of previous applications for payment, whether by summons or warrant, should be made evidence of the facts contained in such declaration until the contrary were proved; and the handwriting of the justice issuing the warrant might also be proved by the declaration (sec. 41 of the Summary Jurisdiction Act, 1879). Even then it would be necessary to prove the identity of the man arrested with the person named in the warrant, and, if the man arrested chose to deny the fact or refuse to answer, there might be no evidence of identity, and the attendance of someone from the place where the warrant was issued would become necessary.

It is said that there would also be difficulties in the way of sending the man to prison, if he denied the statements contained in the above-mentioned certificate, and the proceedings might often fail to attain their object in consequence. But it may be observed that, in enforcing orders against debtors under the Debtors Acts, no practical difficulty is found in dealing with a debtor outside the jurisdiction of the court making the order. The warrant is executed by the bailiffs of the court of the district where the man is, and he is lodged in the gaol there. It should not be necessary to bring the man to the court issuing the warrant, unless the matter could not properly be dealt with at the place of arrest.

This suggestion, if adopted, would, in substance, provide for the bringing of the man up before the court of summary jurisdiction of the district where he is arrested, on such certificate as aforesaid, and for sending him to gaol there, and, in case of a dispute, for sending him, at the expense of the county or place where the warrant was issued, to the court there for committal.

To meet any possible difficulty, where the husband is outside the jurisdiction of the court to which the wife makes application for a warrant for his arrest for non-payment of maintenance money, and she has no means reasonably sufficient to enable her to meet the expense of a warrant and its execution, the Guardians should have power to apply for and meet the expenses of a warrant on her behalf, without the necessity of her becoming chargeable. At present, if the wife is unable to recover her maintenance money through lack of means, she becomes chargeable in many cases.

174. With regard to further means of enforcing payment of the maintenance money by making orders on employers to pay part of the husband's wages to the wife, we have had communications from a number of large employers of labour, copies of which will be found in Appendix XXIV., pp. 155–62. We think that power should be given to the court, in its discretion, to make an order, but that the order should merely authorise the employer to pay the amount ordered to be paid out of the husband's

wages, and that the employer should be at liberty to assent or decline to act on the order, and, if he assents, should have a good discharge by payment according to the order.

We understand that in Scotland there is power in similar cases to make an order which must be acted on when the wages of the husband exceed 20*s.* a week (*see* Lord Salvesen's evidence, 6743), and the Select Committee on Bastardy Orders, 1909, recommended that power should be given to enforce payment of bastardy orders by attaching a portion of the defendant's income, such as wages or payments made periodically to him, but we do not consider a compulsory order advisable, as it might lead to the dismissal of the employee.

We recommend that the person to whom the money is ordered to be paid may, by leave of the court, on default in payment by the respondent, have power to serve a copy of the order of the court on the employer of the respondent, who may assent to discharge the order out of the respondent's wages, and payment made to the person aforesaid of the amount ordered, or a part thereof, shall be a good discharge of the employer and of the order *pro tanto.*

175. The Children Act, 1908, s. 75 (11), provides, with regard to the enforcing of orders on parents to pay contributions to the support of their children in Industrial or Reformatory Schools that—

> " any court making an order under this section for contribution by a parent or other such person may, in any case where there is any pension or income payable to such parent or other person and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard, further order that such part as the court may see fit of the pension or income be attached and be paid to the person named by the court. Such further order shall be an authority to the person by whom such pension or other income is payable to make the payment so ordered, and the receipt of the person to whom the payment is ordered to be made shall be a good discharge to such first-named person."

We recommend the adoption of a similar provision in separation cases; but we would suggest that, in framing a provision for separation cases, it should be made clear that it is not to extend to wages.

176. At present an order for the payment of maintenance is not enforceable before the expiration of one month from the date of the order, and there is unanimity on the part of the witnesses who have mentioned the matter that an amendment of the Summary Jurisdiction Acts in this respect should be made. Most of them suggest that an order for payment of maintenance should be enforceable after seven days. We think this suggestion should be adopted. Women left without means, and requiring payment of maintenance for themselves and children, should not be required to wait a month, before they can enforce payment.

177. Some witnesses have suggested that justices should have discretion to order imprisonment with hard labour for non-payment of maintenance money (*see* the evidence of Mr. Brough, 7789; Mr. Barradale, 8844). It would be of advantage if this power were given.

178. On this question of enforcing orders, it is to be observed that its object is not so much to punish offenders as to provide money for the maintenance of the wife and children. Having regard to the difficulties of providing effective compulsion, the jurisdiction should be exercised with discretion.

179. With regard to a suggestion which was made that an order for maintenance of a wife and the children of whom she has custody, might be enforceable by the officer of the court to whom payment is to be made, we think that the order should be enforced on the application of the wife, since she is the person who best knows the circumstances of the husband, and whether it is reasonable or advisable to press him for payment at any particular time.

180. In cases where a husband improperly attempts to force himself on a wife, who holds a separation order, or fails to comply with an order for maintenance, although

he is able to do so, and yet insists on remaining in the house with her, a power should be conferred upon the court to order his ejectment, and on the police, under the direction of the court, to carry it out.

181. The court should also have power to impose a penalty on a husband who, after an order that his wife shall not be bound to cohabit with him, enters the house where she lives and refuses to leave.

Separation Deeds or Agreements.

182. At present if a husband fails to make the payments due under a separation deed or agreement, the wife has to enforce payment by action, with the necessary expense and delay. She cannot proceed before a court of summary jurisdiction, because the parties have separated by agreement, and she is not able to charge an offence under the Act of 1895. Suggestions for remedying this state of affairs have been made by some of the witnesses.

183. When this difficulty arises among the poor, a more speedy remedy than that by action is desirable. Where there is default in payment under a deed or an agreement for payment of a sum of 2*l.* or less weekly, and the wife desires to maintain the deed or agreement, and to obtain payment pursuant to it, she should be allowed to apply to a court of summary jurisdiction for an order for payment pursuant to its terms, and the court should be empowered to make such order, and to enforce it in the same way as an order for maintenance, the respondent being at liberty to answer the application on any ground which would afford an answer to an action.

184. It would be an advantage, if the wife were also at liberty to take the following course, whether there had been an order to enforce the agreement or not, viz.: If default be made in payment of two or more consecutive instalments, under a deed or an agreement for payment of a sum of 2*l.* or less weekly, or an order enforcing it, she should be allowed to apply to the court to treat the deed or agreement as at an end, and to find that the husband has been guilty of desertion from the date of the first default; and the court should be at liberty to order and find accordingly, and to make an order for maintenance, &c. on the ground of desertion, unless in their opinion reasonable excuse for the default was shown. The respondent should have liberty to answer the application, by proof that he had reasonable cause for leaving the applicant, apart from the agreement of the parties, or by any other ground of defence, which would be open on an ordinary application on the ground of desertion.

From the date of such order, the respondent would be deemed to have been guilty of desertion for the purpose of any future proceedings in the High Court, or elsewhere.

This course would simplify the position with regard to any further proceedings, and would enable the court to vary the amount to be paid within the limit of 2*l.* weekly, although the deed or agreement was for payment of less than 2*l.* weekly.

185. Cases of larger amounts should be dealt with by the High Court, as we shall hereafter recommend (p. 137), and we shall also make some further suggestions, with which it will be more convenient then to deal.

Custody of Children.

186. The power to order custody should include power to order access and power to order payment of separate sums for the maintenance of the child or children, if any. Power is also required to enable the court to commit the children to the custody of a person or persons other than either of the parties. Such person or persons should have power to enforce payment of the amounts ordered to be paid for the maintenance of those committed to his or her or their charge. Sometimes it is to the best interests of the children that some relative or friend should have the custody, and there should also be power to send the probation officer to look after them, as in cases under the Children Act of 1908 relating to cruelty to children.

The total of the payments for wife and children should not exceed the limit aforesaid, namely, the weekly sum of 2*l.*

187. It is not uncommon for one of the parties, in disregard of the order for custody, to take away one or more of the children, the custody of whom has been given by the court to the other party, and at present there is no summary remedy for this. The court should have power to commit the offending party, until the order is obeyed, and to inflict a penalty for the disobedience of the order. Bearing in mind the class of people affected by these orders, we think the court should have power to direct an officer of the court to take possession of, and hand over to the party entitled to the custody, the child or children taken away, and should also have power to authorise the police to assist the officer.

188. On this subject, although it is not within the scope of our inquiry to consider the question of powers to be exercised locally with regard to the custody of children, apart from divorce and matrimonial suits, or applications for separation or maintenance, we think that if local sittings of the High Court be established for divorce and matrimonial cases, it seems worthy of consideration whether such courts might not have included in their jurisdiction, power to make orders as to custody in proper cases, independently of questions as to separation and divorce.

Habitual Drunkenness.

189. Some witnesses have suggested that in an application for separation on this ground, there should be power to commit compulsorily to an inebriate reformatory. There is already the power above stated under the Act of 1902 to commit a wife, with her consent, to a retreat under the Inebriates Acts, 1879 to 1900. We think it would be an advantage in the interests of the parties, their children, if any, and the State, if this power were extended to permit of compulsory commitment both in the case of husband and wife, as the case may be, in the former case on the application of the wife. There is a difficulty about means. We deal with this subject more fully in a later part of this Report (p. 108).

Separate Courts for Separation and Maintenance Cases.

190. It has been suggested that it would be advantageous if these cases were heard under the same conditions as cases heard in "Juvenile Courts" under the Children Act, 1908, sec. 111, more especially as children are so directly concerned in the exposure of the conduct of their parents, and these cases as a rule are of no public interest. On the other hand, this last fact may tend to show that no great harm to the public is done by open public hearings of those cases, because they are not of sufficient interest to be listened to or reported. Many of them arise out of assaults on wives, which will be heard in public under the criminal jurisdiction before the separation summons, and many of them do not involve details of sexual immorality, because adultery is not a ground of application, though it is a ground of defence or of cancelling an order. We deal fully hereafter with the question of the hearing and reporting of cases in the High Court (p. 145 *et seq.*), but, whatever course may be adopted with regard thereto, we think it would be desirable that the magistrates and justices should have power to close the court in any case in which they think proper to do so, in the interests of decency, morality, humanity, or justice. It may be that this power exists at present, but, to make matters free from any uncertainty, we think it should be expressly recognised.

It would be desirable that the plan adopted by certain benches (*e.g.*, Liverpool), of special sittings for these cases should be adopted, so far as possible, and that the justices taking the cases should be of experience therein.

Further Powers in Cases of Desertion.

191. In cases where the wife does not know where her husband is to be found, and the issue of a summons has resulted in no service being effected, the magistrates and justices should be given power to issue a warrant for his arrest. In this case also power should be given to the Guardians, as suggested above, to apply for and bear the expense of execution of, a warrant for the arrest of the husband, without the necessity of the wife becoming chargeable (*see* Mr. Brough's evidence, 7784). Power to the magistrates and justices to imprison the husband for desertion, should be left to the Guardians to deal with, under the Vagrancy Acts as at present.

Limitation of Time.

192. Proceedings under the Summary Jurisdiction Acts have to be taken within six months from the occurrence of the acts complained of, and instances of hardship in the strict application of this rule to cases of separation and maintenance have been pointed out. We think, however, that in order to prevent delay and stale claims being made, it is desirable to preserve this rule in these cases subject to this modification, that the court should have power, in their discretion, to extend the limit.

Note of Evidence and Hearing.

193. There should be a statutory duty on the clerk to the magistrates or justices to take a full note of the evidence given at the hearing of the application, of the decision of the court, and of the reasons of the magistrates or justices for the decision, and upon the magistrate or justices to give the reasons for the decision. At present there is no distinct statutory duty to this effect, and great inconvenience has at times been found in the Divisional Court from the want of such a note and reasons (*see Wenham* v. *Wenham* (1906), 95 L.T. 548; *Barker* v. *Barker* (1905), 74 L.J. (N.S.), P. 74; *Cobb* v. *Cobb*, L.R. [1900], P. 145; and *Robinson* v. *Robinson*, L.R., [1898], P. 153). Since the expressions of opinion in those cases, we understand that the notes and reasons have been generally sufficient. Either party should be entitled on application to the clerk, to be supplied, without cost, with a copy of the notes, and the Statute should so provide.

Right of Reply.

194. It seems to be considered that the applicant has not a right of reply, as the proceedings are under the Summary Jurisdiction Acts. Applications for separation and maintenance are civil in character and not criminal, and it is clear that the applicant should have a right of reply and that the hearing should be conducted in the same way as the hearing of a civil suit, and any amendment necessary to effect this should be made.

Particulars.

195. The summons should specify the relief claimed and the acts on which it is founded, with enough particularity to let the respondent know what he or she has to meet.

It would be an advantage if the respondent were obliged to give notice of any defence other than a denial, but in dealing with the class of persons for whom this procedure exists, it is important not to introduce any unnecessary formalities which might be overlooked, and the power of adjournment prevents advantage being taken of surprise.

If, however, the respondent relies on the adultery of the applicant as a defence, notice of such defence should be given, or, if not given and yet set up at the hearing, an adjournment should be granted, if required. If a respondent seeks to discharge an order, the summons for the purpose should specify the grounds, and sufficient particulars of the acts complained of.

No application for further particulars should, in any case, be allowed. This is a fruitful source of the expense of proceedings in the High Court, and should be met by adjournment if necessary, which would probably seldom be the case, as the parties are usually well aware what are the points at issue.

Notice to Third Party.

196. A party alleging adultery against the other with another person should be required to give such person notice of the proceedings, unless the court dispense with this, for sufficient reason. Great injustice may be done, if charges of adultery are made and heard, without a person who is implicated therein having a chance of being heard. The party served should have a right to appear and defend himself or herself against the charge.

Evidence as to Amount of Earnings.

197. There should be a provision, similar to that in the Children Act, 1908, sec. 124, making a written statement, signed by or on behalf of the husband's employer, *primâ facie* evidence of the amount of the husband's wages.

Corroborative Evidence.

198. It does not seem necessary to introduce legislative provisions on this head, rules as to which are rules of common sense. If the magistrates and justices follow the rules which guide the High Court, there will be no difficulty, and, if they do not, the matter is one for appeal.

Appeal.

199. It might be convenient to the class of persons for whom legislation is recommended, if appeals were heard before the District High Court Commissioner, but appeals in these cases are rare, and it is an advantage that one tribunal should take them all, as is done at present by a Divisional Court of the Probate, Divorce, and Admiralty Division. There would be no difficulty about them, if the system of assigning solicitor and counsel, which we recommend hereafter for the cases in the High Court, were applied to these appeals in pauper cases.

As to Limitation of Amounts.

200. It was suggested that a court of summary jurisdiction might have power to make a larger allowance than 2*l.* weekly, but we are not in favour of the suggestion. We think that, with the suggested scheme of local tribunals, effective and economic means can be afforded of enabling persons, who are entitled to bring cases in the High Court and obtain alimony or maintenance, to make application to that Court for such alimony and maintenance, in accordance with the practice of the Court. Under the amendments which we propose, the High Court will have additional powers to deal with maintenance, as hereafter stated (p. 123), but parties should not be allowed to apply to the High Court without its leave, if the applicant claims maintenance not exceeding 2*l.* weekly, and the case be one within the jurisdiction of a court of summary jurisdiction, and applications to the district courts should be confined to persons whose means are limited, as we have stated in the previous part on local courts (p. 63). These matters can be most conveniently dealt with by rules of court, as already explained.

PART XIV.

QUESTION V.—SHOULD THE LAW BE AMENDED, SO AS TO PLACE THE TWO SEXES ON AN EQUAL FOOTING, AS REGARDS THE GROUNDS UPON WHICH DIVORCE MAY BE OBTAINED?

Present State of the Law.

201. The law at present permits of a man obtaining a divorce on the ground that his wife has, since the celebration of the marriage between them, been guilty of adultery, but a woman cannot obtain a divorce merely on the ground of her husband's adultery. She can only do so in the following cases, that is to say, where her husband has been guilty of—

(1) Incestuous adultery,
(2) Bigamy with adultery,
(3) Rape,
(4) Sodomy or bestiality, or
(5) Adultery coupled with—
  (*a*) such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro*; or
  (*b*) desertion, without reasonable excuse, for two years or upwards.

It is important, at the outset of the consideration of the question, to ascertain how the difference between the case of the man and that of the woman arose.

Historical.

202. For this purpose it is not necessary to examine the early history of marriage, which will be found fully investigated by Mr. Westermarck in his work, "The History of Human Marriage" (*see* especially pp. 523–29, 2nd edition). The relative position of men and women, in certain of the early periods of history, is given in the notes by Mr. de Montmorency (Appendix I.).

Women in England and elsewhere have been gradually emerging from the position they occupied in times when a wife was looked upon almost as her husband's chattel, and marriage was a matter of purchase; and when the husband's rights were far greater than the wife's.

It may, however, be observed that there are passages in the Early Fathers unequivocally asserting the equality of the moral obligation imposed on both sexes: that similar views had been expressed by Aristotle, Plutarch, and Seneca*; and that, in theory at least, this doctrine was recognised as a legal maxim by Ulpian: "Periniquum enim videtur esse, ut pudicitiam vir ab uxore exigat, quam ipse non "exhibeat."†

Christianity recognised the broad principle of the equality of the sexes in their personal relations.

The Ecclesiastical Courts granted divorces *a mensâ et thoro* on the same grounds to husband and wife: and, as the High Court of Justice is directed by the 22nd section of the Act of 1857 to give relief in all cases, other than proceedings to dissolve a marriage, on the principles of the Ecclesiastical Courts, there is, in this country at the present day, an equal right for husband and wife to proceed to enforce a suit for judicial separation on the ground of adultery, whether such adultery consist of a single act or more.

But however much these principles were recognised in theory and in the practice of the Ecclesiastical Courts, it cannot be maintained that popular sentiment, at any rate among men, was in accord with the principles of the churches. Those familiar with the history of morals and the literature of past days will acknowledge that there has been a great difference in the censure which has been passed upon men and women, and that seduction and immorality in men have been looked upon with comparative leniency, while similar conduct has been treated as infamous in the case of women.

Practice as regards Private Acts.

203. We have shown how, and in what circumstances, the extraordinary procedure of dissolving marriages by private Acts of Parliament was adopted, and carried on, until the year 1857. A Divorce Bill could be carried through, almost as a matter of right, at the suit of a husband on the ground of his wife's adultery, and when he himself

* Lecky's "History of European Morals," 10th ed., Vol. II., p. 313.
† Just. Dig. lib. XLVIII., V. 14 (13) Ed. Th. Mommsen, Vol. II. (1870), p. 808.

was of proper conduct, but a wife could not obtain the passing of a Divorce Bill except in cases of aggravated enormity. This practice dates from a time when the attitude of the sexes towards each other was different from that which obtains to-day, and that practice was followed with English adherence to precedent till 1857, and is still embodied in the Statute of that year.

204. During the period of private Acts of Parliament, of the large number of Acts passed, only four were in favour of wives. It is probable that questions of title, inheritance, legitimacy, &c., would account for more Bills being launched by men than by women, but we must look to the tone of society for the remarkable difference in the treatment of the two sexes. The Divorce Commission of 1850 state in their Report, in 1853, that, in two of the four cases just mentioned, the adultery was incestuous; in the third, there was profligacy, deceit, abandonment, and the grossest injury done to women which villainy could inflict; and in the fourth, there was bigamy. For the reasons given by the Commissioners for this difference in treatment, we may refer to paragraph 40 of their Report. Without taking any general evidence upon the point, they appear to have been satisfied with the correctness of the opinion of Dr. Johnson, which they quote as a just observation, that "the difference "between the adultery of the husband and of the wife" (socially speaking) "is "boundless."

205. They appear to have been largely influenced by the view that the fault on the part of the woman is worse than that on the part of the man, because her fault may introduce spurious offspring into the family, and also by the impression that a woman may more readily be expected to forgive an adulterous husband than he can be expected to do if adultery be committed by the wife.

But the position of women has entirely changed since the days when the practice of private Acts of Parliament prevailed; and views expressed and acted on in the 17th and 18th centuries are no longer entertained. If adultery be an offence, modern thought proscribes it equally in man and woman, and declines to credit the idea that a man ought in duty to be less forgiving than a woman. As to the effect on the family of adultery on the part of the man differing from that of a woman, it has to be remembered that, if we consider the matter in its public aspect, and not solely with reference to the particular husband and wife, though the act in a man may not affect his own family, it may affect some other family, and that the wife, while she cannot obtain a divorce, has power to leave her husband, and obtain a judicial separation from him. If a woman is to be expected to forgive her husband, and is not allowed to obtain a divorce from him because she ought to forgive him, an extraordinary position results. The situation is treated as meriting legal relief, and a power is left to her, at her discretion, to punish him by inflicting upon him enforced celibacy, with the result that she has to elect between her own lifelong disuse of her natural functions and the condonation of the offence of her husband, which may have amounted to continuous sexual intercourse with another woman.

There is another curious inconsistency in the present state of the law. Rape is an offence for which a woman may obtain a divorce. The offence against the State is greater than in the case of mere adultery; but the offence against the wife is the same in both cases.

The Act of 1857.

206. The Act of 1857 stereotyped the old views, but efforts were not wanting in the debates to effect a change in the direction of equality. Some evidence in favour of it was given before the Select Committee of the House of Lords in 1844. Sir John Stoddart said (Q. 74): ". . . as matter of principle I do not see, when two persons "come together, and bind themselves by a common oath in the same terms, why "the violation of the oath by one should not be held to be just as good a ground of "dissolving the contract as by the other." The Lord Advocate, being asked (Q. 138) as to whether any inconvenience had been found in Scotland to result from giving the wife an equal remedy with the husband in obtaining a divorce *a vinculo*, said that he was not aware of any inconvenience. Mr. Maconochie was asked: (Q. 36) "Is it your "opinion that marriage ought to be dissolved on account of the adultery of the husband "in every case?—(*A.*) I should certainly say so, speaking generally, from my own "experience in Scotland." (Q. 37) "That, if a single act of adultery on the part of

" the husband can be proved, the wife should have it in her power to dissolve the " marriage?—(*A.*) The same remedy that is given to the husband, I think ought to " be afforded to the wife." (Q. 38) " Is that the general opinion of Scotch lawyers? " —(*A.*) I should say so, decidedly."

When the Bill of 1857 was before the House of Lords, Lord Lyndhurst maintained that the existing state of the law was to demoralise and degrade the lower classes, and urged in strenuous language the equality of the sexes. He referred to Scotland, the Ecclesiastical Law, the Reformatio Legum, and quoted Lord Eldon, Lord Thurlow, and Dr. Lushington.*

In Committee, a motion by Lord Donoughmore to enable a wife to obtain a divorce, on the ground of the adultery of her husband, was rejected by 71 votes to 20.†

In Committee, in the House of Commons, Mr. Drummond moved an amendment having for its object the establishment of the equality of the sexes, but the Attorney-General objected, on the ground that the Bill was to amend procedure, and the law was settled. Mr. Gladstone held that the law was not fixed. He looked on the importation of divorce *a vinculo* as an evil, but if it were to be introduced, he expressed himself in favour of equality:—

> "I believe that the evil of introducing this principle of inequality between men and women is far greater than the evil which would arise from additional cases of divorce *a vinculo*; and I take my stand, in the first place, on this, that, if it be assumed that the indissolubility of marriage has been the result of the operation of the Christian religion on earth, still more emphatically I believe it may be assumed that the principle of the equality of the sexes has been the consequence of that religion. You have in the very earliest times some traces of what approaches to it; but it is the special and peculiar doctrines of the Gospel respecting the personal relation in which every Christian, whether man or woman, is placed to the person of our Lord that form the firm, the broad, the indestructible basis of the equality of the sexes under the Christian law."‡

After arguing as to the position of women, that they are not so impure as men, he proceeded to urge that the measure as framed was assertive of the superiority of man's position in creation. He adopted Lord Lyndhurst's view, and said the proposed change would deter men from commission of offences, which, among husbands, are infinitely more common than among wives. After discussion, the amendment was rejected by 126 votes to 65.

An amendment was moved by Lord John Manners to insert words, which would enable a wife to obtain a divorce for adultery by her husband, committed in the conjugal residence.§ After some discussion, the Attorney-General spoke to the effect stated above (p. 14); but, in the end, Lord Palmerston interposed, and decided not to divide the Committee, and the amendment was thus accepted. When the Bill went back to the House of Lords, the amendment was struck out, on the motion of Lord St. Leonards, by 44 votes to 27,¶ and the reasons given to the House of Commons were that the words were indefinite, would give rise to difficult questions of fact and law, and might lead to collusion. The House of Commons did not insist on the amendment, Lord Palmerston pointing out that it had been resisted by the Government, but carried against them.‖

Equality of the Sexes in Scotland and most other Countries.

207. The result is that, while in Scotland the sexes are on an equality with regard to grounds of divorce, in England they are not. From the evidence of Lord Salvesen, one of the senators of the College of Justice in Scotland, we extract the following passages:—

> "6306. What is the difference in Scotland between men and women?—Absolutely none. They have exactly the same rights before the law."
>
> "6307. Have you found by experience that that has worked well?—I think it has worked very well. Of course, I know quite well there are many reasons alleged why the same law should not apply to husbands as applies to wives, and I quite appreciate the force of these, for physiologically there are differences, and public opinion has always regarded the chastity of men as of less importance than the chastity of women, and even female opinion regards the ante-nuptial

* Hansard, vol. 145, 499 *et seq.* † *Ib.*, vol. 145, 812–14. ‡ *Ib.*, vol. 147, 1272.
§ *Ib.*, vol. 147, 1534. ¶ *Ib.*, vol 147, 2046. ‖ *Ib.*, vol. 147, 2085–7.

incontinence of men in a very different way from that in which it regards the incontinence of women. But for all that, I think in practice our law works extremely well, because we do not find that women as a rule take proceedings against their husbands for what may be called casual acts of adultery, but only where the marriage relation has become intolerable upon other grounds, and I think you will find that borne out by the statistics where a considerable majority of actions of divorce for adultery are at the instance of men, although I think it may be safely inferred there are far more women who are injured in that respect than there are men; and accordingly, in practice, we do not find that the woman rushes into the divorce court if she is on otherwise good terms with her husband, and has regard for the unity of the family, because of a lapse from virtue on his part. At the same time I think she should have the remedy if she desires to exercise it, and that in many cases it operates very much in the direction of promoting public morality."

"6308. Just to get this a little clearer, because it is an important point. Your tables show that the larger number of charges of adultery are at the instance of the husband?—Much the larger."

"6309. Although as you are pointing out, as I follow you, the probabilities are that the husbands have been more unfaithful than the wives?—Yes."

"6310. And therefore if the suit was by the wife frequently taken by the wife on the ground of adultery there would be greater opportunity of taking it than if it was by the husband?—Yes, I should say very much greater opportunity."

"6311. But you do not find that actually done?—No."

"6312. Then in actions of desertion the majority of pursuers are wives?—Yes."

"6313. I will ask about that later on. I should like to get from you how you think the fact that a wife can sue for adultery alone acts as a deterrent?—Well, I think for this reason. If she has no remedy for adultery on the part of the husband, practically it amounts to giving him a licence to commit adultery so long as he does not combine with that cruelty or desertion. He can defy his wife's remonstrances or disregard them entirely. Whereas if he knows that she may dissolve the union and bring him into court it exercises a most powerful deterrent. Not merely that, but the decree of divorce pronounced against the husband operates exactly as his death and the wife is at once entitled to the same share of his estate she would be entitled to when he died."

"6314. What is that in Scotland?—In Scotland if there are children she would be entitled to one-third of his movable estate and a life-rent of one-third of his heritable estate."

"6315. Who takes them otherwise?—The children would at the death of the father, but they take no benefit from the divorce. But if there are no children then the wife takes one-half and a terce which is a life-rent of a third of his heritable estate."

"6316. So if she can institute a case for divorce on the ground of adultery she not only gets free from him but takes a portion of his property?—Yes, and takes half of the movable estate if there are no children."

"6317. And that is a strong deterrent?—Yes."

"(*Lord Guthrie*). And probably she gets the custody of the children."

"6318. (*Chairman.*) I was going to ask one further question. What powers have the courts to decree in such a case as that provision for the children?—Oh, if the wife is awarded the custody of the children, which if she is a successful pursuer, she is *primâ facie* entitled to, she gets an award of aliment for each child she has with her."

"6319. That is in addition to her one-third?—In addition to the share of her husband's estate; but the courts very often divide the children unless the moral character of the father is such as to endanger their upbringing."

"6320. I suppose they have a general discretion in the interests of the children?—They have a complete discretion in the matter; the only thing one can say is the successful pursuer in an action for divorce, whether a man or a woman, has *primâ facie* the right to the custody of the children."

"6321. Well, I need hardly ask you, but you regard the Scotch law as better than the English?—I do."

"6322. Has there been any general indication of feeling in Scotland for a change in that respect?—I have never seen any suggestion to that effect in literature or the public press, though we have had this law in full operation and vigour since 1560 as part of the common law of the country; because it is not statute law—the right of divorce for adultery."

"6323. I see you sum up this point by making a general observation upon it. Perhaps you will kindly tell us what you have to say in general?—Well, I should say, in the first place, that with regard to legal opinion and the opinion of my brethren on the bench, I think I am expressing their opinion on this matter entirely. I have had an opportunity of submitting my proof to the present head of the court, and he authorised me to say that, so far as it deals with matters of opinion, he is in entire accord with it. With regard to the other points, I think that our law conduces very much to the morality of husbands and to the peace of families, because it is much better that an offence against the conjugal tie on the part of the husband should be a matter for forgiveness on the part of the woman than that she should have no remedy for it."

208. In most of the other countries mentioned above, in which divorce is permitted on the ground of adultery, no distinction between the sexes is made. These include Austria (for Protestants), Bulgaria, Denmark, France, German Empire, Hungary (for Protestants, Greeks, and Jews), The Netherlands, Norway, Roumania, Russia, Sweden, and Switzerland. The rule is the same in Cape Province, Natal, New Zealand, and New South Wales, subject in the last two, to certain provisions as to domicil. In the United States of America the sexes are on an equality as regards grounds of divorce.

209. A Bill was introduced into the House of Commons in the year 1892. It was intituled "A Bill to amend the Law of Divorce," and was backed by Mr. Hunter, Mr. Asquith (the present Prime Minister), Mr. Cobb, Mr. Fenwick, and Mr. Herbert Gardner (now Lord Burghclere).

According to that Bill, a wife might petition for divorce against her husband on the ground of adultery alone, and either party might petition for divorce on the ground that the other had been guilty of desertion, without reasonable excuse, for four years and upwards.

The latter point bears on the question of grounds of divorce other than adultery.

The Bill, as we understand, after being read a first time, was not proceeded with.

Consideration of the Principle Applicable.

210. In principle there can be no adequate reason why two persons, who enter into matrimonial relationship, should have a different standard of morality applied to them, and, what is perhaps most remarkable about the difference in question is that it is not recognised as applicable to the right to judicial separation, for either man or woman may obtain a decree of this nature for a single act of adultery. Those who maintain that judicial separation is a greater punishment than divorce are probably right, for the former may inflict lifelong celibacy and with no right of re-marriage, and the latter does not. Thus the punishment, which may be inflicted on a man for a single act of adultery, may be greater than that which may be inflicted in the case of the greater offence of continuous adultery with cruelty or desertion, though the wife might even in the latter case choose to take a decree of separation and not of divorce.

211. Apart from abstract justice the strongest reason for placing the sexes on an equality is that, where two standards exist, there is a tendency to accept the lower for both parties. The social and economic position of women has greatly changed in the last hundred and even in the last fifty years. The Married Woman's Property Act, 1882, has given them a new status in regard to property; they engage freely in business and in the professions, and in municipal, educational and Poor Law administration, and claim equality of treatment with men. In our opinion it is impossible to maintain a different standard of morality in the marriage relation, without creating the impression that justice is denied to women, an impression that must tend to lower the respect in which the marriage law is held by women.

212. In the passage above quoted from Lord Salvesen's evidence, it is suggested that the abolition of the distinction will tend generally to raise the moral tone amongst men. If a man does not combine cruelty or desertion with adultery, he does not subject himself to a suit for divorce, whereas, if he knows that his wife may dissolve the union on the ground of his adultery alone, a powerful deterrent exists against the commission of the offence. It may be said that he is already liable to a suit for judicial separation, but this is a remedy which leaves the petitioner in a most unsatisfactory position, and few suits of this character are now brought.

Nothing has been more striking in our inquiry than the agreement amongst the great majority of the witnesses, who dealt with the question, in favour of equality.

213. Besides the evidence of the witnesses who actually attended before us, a large number of resolutions by the bodies undernoted have been communicated to us. Forty-seven branches of the National British Women's Temperance Association have addressed a letter in similar terms to the Chairman. A copy of this letter, and a list of the branches sending it, are set out in Appendix XXV. D., pp. 167–8, and it will be seen that, in the concluding paragraph, this passage occurs: "For these and "other similar reasons we desire heartily to endorse the weighty opinion expressed "by many eminent witnesses before your Lordship's Commission in favour of making "the legal, no less than the moral, misconduct similar for both sexes." Letters and resolutions in substantially similar terms from 26 other branches of the said Association have also been forwarded to the Chairman, or other Commissioners, in support of a similar standard for men and women. A list of these branches is given in Appendix XXV. D., p. 168.

Resolutions to a similar effect have also been received from the following societies:—

Birkenhead and District Women's Guild.
Birkenhead and District Women's Suffrage Society.
Birkenhead Women's Adult School.
Birkenhead Women's Local Government Association.
Coventry and District Women's Liberal Association.
Glasgow City Branch of the Independent Labour Party.
Liscard Branch of the Women's Labour League.
Liverpool Branch of the National Union of Women Workers.
Liverpool Union of Women Workers.
Manchester, Salford, and District Branch of National Union of Women Workers.
National Council of P.S.A.'s Brotherhoods and Kindred Societies (Women's Committee), Peterborough.
National Women's Labour League—Durham and Northumberland Branches.
Pontypridd and District Women's Liberal Association.
Seacombe Branch of Independent Labour Party.
Wallasey and Wirral Women's Suffrage Society.
Wallasey Socialist Society.
Women's Cottage Guild, Liscard, Cheshire.
Women's Liberal Federation.

Copies of the letters and resolutions will be found in Appendix, XXV. E., pp. 168–71. We have had no evidence of difference of opinion among women on this matter; and we understand that women of all classes and all shades of religious and political opinion are unanimously in favour of equality of remedy in matrimonial causes.

214. Some of the other witnesses, however, do not consider that the husband's adultery should be a sufficient cause in itself to entitle the wife to a divorce, as it is in the case of the husband for the wife's adultery. The general effect of this class of evidence is that these witnesses do not consider that an act of adultery on the part of a man has the same significance as has an act of adultery on the part of a woman, and that an act of adultery on the part of a man may be more or less accidental. This term "accidental" is to be found in the debates in 1857, and was used before us. At the same time, we take the general effect of the evidence of these witnesses to be that, where the husband's adultery is continuous or committed in circumstances of open indignity to the wife, she ought to be able to maintain her suit for a divorce.

215. These views led to strenuous protests, to be found in the letters and resolutions to which we have referred. They are, however, an advance upon the strictness of the terms of the Act of 1857, and might meet many cases not covered by that Act. They do not appear, however, to be founded on any sound principle, and they leave a wife's position open to a variety of difficulties. What is to be understood by continuous adultery? How often would the offence have to be committed, if it were to be considered continuous? What are to be the circumstances which amount to open indignity? One set of circumstances was suggested, that is, adultery in the conjugal residence, but there does not seem to be any substantial distinction between such adultery, for instance, during the absence of a wife, and adultery committed, say, in an adjoining house, or notoriously in the same neighbourhood.

216. There is, in addition to these difficulties, the important point upon which we have had the advantage of the evidence of medical witnesses. In continuous adultery the mistress may otherwise be a pure woman, and, regarded in its medical aspects, the adultery may be a source of no physical danger to the wife. But a single act of adultery, that which might come under the term "accidental" as used in evidence, is, as likely as not, committed in circumstances which give rise to every possible risk of infecting a man with venereal disease, and, by reason of such infection, a wife's health and that of her children may be most seriously affected, or sterility may be produced. It is terrible to read and study the evidence of some of the witnesses as to the extent of diseases of this character, the disastrous effects on men, women, and children, and the appalling amount of suffering occasioned thereby. We refer especially to the evidence of the medical men and women of experience called before us, and might particularly call attention to the evidence of Mr. J. Astley Bloxam, the senior consulting surgeon to the Lock Hospital (40,830 *et seq.*), and Dr. Frances Ivens, honorary medical officer for the diseases of women, Liverpool Stanley Hospital (34,492 *et seq.*).

217. No reference to the subject dealt with in the previous paragraph is, so far as we are aware, to be found in the debates of 1857, and it is only when attention is forcibly directed to it by such evidence as has been placed before us, that its bearing upon the question of the equality of the sexes, and the necessity for every possible step being taken which may tend to place sexual morality upon a higher footing than has hitherto existed, can be properly appreciated, and a sound judgment can be formed as to whether the fact that the adultery of the husband is or is not continuous should make any difference in a wife's legal rights. In such circumstances as are disclosed in the evidence we have just referred to, ought a woman to be expected to forgive, and is it necessarily desirable for her to forgive her husband? This, we have already noticed, has been considered a ground upon which a woman should be in a different position to a man, because it has been suggested, forgiveness is to be less readily expected from a man than from a woman. We have already pointed out that this expectation has never been and is not contemplated by the Legislature as applicable to judicial separation, and it may not unreasonably be asked why it should be contemplated as applicable to divorce. The State, which cannot itself originate proceedings, may well leave all the interests concerned, more especially that of the wife and her children, to her option in the latter case, as well as in the former.

218. We do not overlook the arguments founded on physiological considerations, and the different consequences of immorality in one case and in the other, but it seems to us that those arguments are outweighed by the other considerations presented in this report.

Recommendation.

219. Our conclusion is that no satisfactory solution of the problem, which is raised as to the personal relations between husband and wife, can be found, except by placing them on an equal footing, and by declaring that, whatever grounds are permitted to a husband for obtaining a divorce from his wife, the same grounds shall be available for a wife in a suit against her husband. It may be safely left to a woman to consider whether she will exercise her rights, and it may reasonably be expected that, as has been proved by actual experience in Scotland, physical, social, pecuniary, and other considerations will have their natural effect, and lead to such rights not being exercised, at any rate in the great majority of cases, without such good and sufficient reason as will meet with the approval of relations and friends of the wife.

PART XV.

QUESTION VI.—SHOULD THE LAW BE AMENDED SO AS TO PERMIT OF DIVORCE BEING OBTAINED ON ANY, AND, IF ANY, WHAT GROUNDS, OTHER THAN THOSE AT PRESENT ALLOWED?

Principle.

220. In our opinion, this question is the most difficult question and one of the most important, if not the most important, which we have to consider. The answer to it depends upon whether the principle indicated at p. 37, para. 48, of this Report (which is the only principle upon which the Legislature can properly act) be adhered to. From the State's point of view, the question is whether marriages should be indissoluble, or whether they should be dissoluble on grounds which arise out of human needs. Those needs have various causes. Leaving out theological considerations, adultery has to be considered, not as a peculiar cause, but as one of the few causes which go to the root of the marriage relationship and render joint married life practically impossible. Adultery, after all, is only an example of what Shakespeare, through the mouth of Hamlet speaking to the adulterous queen, (in a passage quoted in the Report of the Royal Commissioners of 1853) calls—

" . . . . such a deed
" As from the body of contraction plucks
" The very soul."

[*Hamlet*, Act III., Scene IV.]

221. The law of England has already permitted the dissolution of marriage on the ground of adultery, and no one has ventured to suggest that a repeal of the present law is within the range of practical politics. The question, therefore, which has to be considered is whether any, and what other, causes than adultery should be permitted as grounds for dissolution.

222. We have already stated that, in our opinion, the State should not regard the marriage tie as absolutely indissoluble in its nature, or as dissoluble only on the ground of adultery, but may regard the dissolubility of the tie as not limited to the ground of adultery, and may allow other grave causes to be added (p. 37).

We proceed to consider whether any causes, and if any, what causes, should be admitted as grounds of divorce, and we state the question thus generally, although we have pointed out that adultery is already recognised by law as a ground.

223. It is recognised by the western nations and by those sprung from them, that, even if there is no law of nature which dictates that the union of man and woman should be monogamous, a monogamous union is that which best promotes the interests of humanity, and, as the Chairman points out in his Notes (Vol. III., p. 545, para. 119) this recognition has been intensified by the influence of Christianity.

It is further recognised, as a natural consequence of a monogamous union, that it is for the best interests of the parties, their children and the community, that such a union when once formed should be continuous. It is not regarded as an ordinary simple contract in which no one is concerned except the parties, and it is considered that it ought not to be put an end to at their will. The children of the marriage, whose procreation, upbringing, education, and maintenance are among its primary objects, are interested in the maintenance of the status of their parents which is created by it. The community in general is interested in its citizens maintaining proper standards for themselves, and especially in their bringing into existence healthy children and maintaining and educating them, and in the maintenance of that family life which results from marriage and is the foundation of society. It is recognised that the incidents of the relationship created by marriage should be regulated by the State, and that its continuance should not depend on the will of the parties, but should only be determined by the same authority.

224. Certain grave causes have already been recognised in England as elsewhere, as putting an end *de facto* to married life, and as entitling, or even compelling, reasonable and right thinking persons to take legal action accordingly, in their own interests and in the interests of their children.

One of these causes is adultery, which prior to 1857 was recognised as giving a right to obtain by Act of Parliament a divorce *a vinculo* and, through the law Courts, a divorce *a mensâ et thoro*, and since that date has been a ground not only for judicial

separation, but for judicial dissolution of marriage, without any further ground, in a suit against a wife, and, with certain aggravating circumstances, in a suit against a husband.

Cruelty has been and is recognised as another of these causes, but the remedy which has been hitherto applied is the remedy, adopted from ecclesiastical principles, of permanent separation, without a dissolution of the marriage tie.

Further, the Legislature has recognised that, wilful desertion for two years and upwards, and habitual drunkenness, in fact put an end to joint married life, but has provided, as the only remedy, that the parties shall be permanently separated without a dissolution of the marriage tie. Thus, in three cases, namely, wilful desertion, cruelty, and habitual drunkenness, the State has recognised the right of the injured person to permanent separation from the offender.

But the true question is whether the remedy of judicial separation is adequate in such cases; and if other causes produce the same *de facto* termination of married life, the question in these cases also is whether a remedy by judicial separation is adequate, or whether the more extended remedy of dissolution of marriage should not be available for the injured spouse.

Judicial Separation.

225. It seems necessary to consider first the remedy by decree of judicial separation. It was substituted for the old decree of divorce *a mensâ et thoro* by the 7th section of the Act of 1857, and, in addition to the grounds on which that decree could be made, was applied to desertion without cause for two years and upwards. By the decree, the parties to a marriage are separated, but the tie of marriage is not dissolved. The separation is permanent, unless both parties agree to put an end to it. The wife is considered from the date of the sentence, and whilst the separation continues, as a *feme sole* as regards property she may acquire, &c., also for purposes of contract, &c., (Act of 1857, ss. 25 and 26); orders, for alimony to a wife and as to custody, maintenance, and education of children, may be made.

226. Divorce *a mensâ et thoro* (for which the term judicial separation is now substituted) was granted by the Ecclesiastical Courts. It places the parties in a position in which, while they remain married, they are subjected to enforced celibacy. Such separation has been frequently and strongly condemned, as inadequate to meet the situation, and as productive of immorality, and misery to the parties, both the innocent and the guilty, and detrimental to the interests of the children.

227. Divorce *a mensâ et thoro* is condemned in the 19th Article of the Reformatio Legum, under the head De Adulteriis et Divortiis: "since this practice is contrary "to the Holy Scriptures, involves the greatest confusion, and has introduced an "accumulation of evils into matrimony . . ."

In the 17th century we find, in Bishop Cozens' argument in Lord Ross's case, quoted in the Duke of Norfolk's case, the following passage* :—

> "The distinction betwixt bed and board and the bond, is new, never mentioned in the scripture, and unknown to the ancient church; devised only by the canonists and schoolmen in the Latin church (for the Greek church knows it not), to serve the pope's turn the better, till he got it established in the council of Trent; at which time, and never before, he laid his anathema upon all them that were of another mind; forbidding all men to marry, and not to make any use of Christ's concession."

Mr. Bishop, in section 68 of his book on "Marriage, Divorce, and Separation," before mentioned, says of judicial separation :—

> "This proceeding, neither dissolving the marriage, nor reconciling the parties, nor yet changing their natures; having, at least, no direct sanction from Scripture; characterized by Lord Stowell as casting them out 'in the undefined 'and dangerous characters of a wife without a husband, and a husband 'without a wife'; by Judge Swift" [an American judge] "as 'placing them 'in a situation where there is an irresistible temptation to the commission 'of adultery, unless they possess more frigidity or more virtue than usually 'falls to the share of human beings'; by Mr. Bancroft," [the historian of the United States] "as punishing 'the innocent more than the guilty'; by an English writer, [Macqueen]" as 'a sort of insult, rather than satisfaction, to

* 13 How. St. Tr. 1334.

'any man of ordinary feelings and understanding,'—is, while destitute of justice, one of the most corrupting devices ever imposed by serious natures on blindness and credulity. It was tolerated only because men believed, as a part of their religion, that dissolution would be an offence against God; whence the slope was easy toward any compromise with good sense; and as the fruit of compromise we have this ill-begotten monster of divorce *a mensa et thoro*, made up of pious doctrine and worldly stupidity"

He then cites the passage from Bishop Cozens above quoted, and proceeds:—

"Yet in the face, not only of this testimony, but of all opinions not moulded by theological dogma, [in] Protestant England, and a large proportion of the States of this country where the tenets of no particular religious sect pervade our legislation, this divorce from bed and board, termed in the modern English statutes judicial separation, this nuisance in the law, is suffered to stand unquestioned!"

228. It would be too long a process to quote all the writers and authorities, and all the witnesses before us, who have supported the views thus expressed, but we may refer to the evidence of Mr. Justice Bargrave Deane, who, speaking of separation, said (873): "I would not have separation. It is a living death—that is "the way I look on separations. It is wrong altogether. Either they must live "together or live apart, and that means be divorced." The learned Judge appears to have been speaking in this passage of permanent separation, where the causes of separation would afford grounds for divorce. It is to separations which will in all probability be permanent, and not to temporary separations for immediate protection, that the objections apply. In the latter it may be reasonable to hope that the parties may rejoin each other, but in the former this result cannot be expected and rarely takes place.

229. We further refer to the remarks of the Hon. Henry B. Brown, ex-justice of the United States Supreme Court, in an address delivered before the Maryland State Bar Association, and reported in "Law Notes," Vol. XIII., No. 7 (published at Northport, New York, U.S.A., 1909). Speaking of divorce, *a mensâ et thoro*, he said—

"A situation more provocative of temptation and scandal cannot be imagined. For the former relation is substituted a marriage which is not a marriage—a celibacy, an amphibious existence which places the strongest instincts of our nature under a bann and deprives both parties not only of the companionship of the other sex, but of the comforts of a home life. A legal separation is, in fact, a punishment, rather than a remedy . . ."

Some of the passages above quoted were referred to by Mr. John Arthur Barratt, who was asked this question (16,752):—

"How far do you think that represents the views of the people in America?"

His answer was:—

"I think that would be the general view adopted by most people of any standing, that there is no good purpose to be observed by keeping people tied together for ever during their lives without the possibility of re-marriage, if they are never going to live together again."

230. Lord Salvesen refers to two Scottish legal authorities, and adds his own view:—

"6359. What is the general view in Scotland with regard to the way in which these grounds of divorce are looked upon?—They are favourably commented upon by all our leading institutional writers, and Lord Fraser says on page 1141: 'The conjugal relation has stood not less, but infinitely more secure 'and sacred, since separations *a mensa et thoro* for adultery, which were 'extremely common under the Popish jurisdiction, fell into total disuse; and the 'number of actions for divorce *a vinculo* has, in proportion to that of the 'population, remained nearly the same at all periods since the Commissaries 'were first appointed in 1563, down to the present time.' And another authority on the law of husband and wife, Professor Walton, says, 'Public 'feeling is strongly against increasing the number of persons living as if 'single, and yet not free to marry: husbands without wives and wives 'without husbands.' I think these authors have expressed what is the

ordinary view in Scotland, and what seems to me to be consistent with common sense."

"6360. What does your own experience lead you to as a conclusion about separation without dissolving the tie of marriage?—I think they invariably lead to the persons just leading their own lives and not having any regard for chastity at all. I think when you deal with a large body of the population, if a man (because it is nearly always in cases of separation and aliment that the action is instituted by the woman) is turned out of doors, so to speak, he consoles himself with other female society."

231. A great number of the witnesses, including even those who are opposed to divorce entirely, have pointed out the disastrous results that arise from permanent separation without divorce. Typical of this class of evidence is that given by the Rev. John Scott Lidgett, Ex-President of the Wesleyan Methodist Conference and warden of the Bermondsey Settlement, who appeared on behalf of the Wesleyan Methodist Committee of Privileges. Speaking of separation orders, he says (39,720):—

"I should like to add that all those with whom I have to do are greatly opposed to the disability of the poor with regard to obtaining divorce, on the ground of the immoral consequences of separation orders. Our experience is that separations lead to the formation of irregular unions, and that it will be far better where the cause of divorce exists, which is allowed in the case of the rich, and in the interest of morals, that the poor should have the relief of divorce rather than of mere separation."

232. Although the following passage from the evidence given by Mrs. Steinthal, on behalf of the Mothers' Union, bears more directly upon the question of separation orders, it is of importance on the matter now under consideration. In the memoranda of evidence (put in by her) collected by the Mothers' Union from officials, &c., there is the following question No. 4 (*see* 17,100): "What have you found to be the "moral effect of separation orders (*a*) in the case of husbands; (*b*) in the case of "wives?" The following are the answers:—

"*Durham* (Durham):—(*a*) Immorality; (*b*) Ditto. *Essex* (Colchester):—In my experience I have nearly always found that the man and woman live in sin afterwards. *Hereford* (Hereford):—Bad in every way. (Hereford):—(*a*) Bad; (*b*) Not so bad if man pays. *Hertford* (Bishop's Stortford):—Misconduct in both cases. *Hampshire* (Aldershot):—Difficult to answer, but should say that the immorality, if any, commences before the separation act. *Kent* (Maidstone):—In some instances the husbands are living good lives and the wives are not. In other cases it is the opposite. *Lancashire* (Burnley):—(*a*) Bad; (*b*) Bad. (Manchester):—(*a*) Bad; immorality in majority of cases; (*b*) Good in majority of cases. The order protects the wife and she is often able to keep herself and family respectable. (Manchester):—Bad in both cases, though more invariably so as regards the husband. (Stretford):—I do not think so bad for woman as for man. *London* (Belgravia and Pimlico):—(*a*) Immorality; (*b*) Morality, so far as my experience goes. (Wimbledon):—No experience. (Clapham and Upper Tooting):—Not good in either case. (Piccadilly):—Varied; sometimes salutary. They find that after all they cannot get on without each other, and when they get over their temper are glad to make it up. (Battersea):—(*a*) Immorality; (*b*) the same in some cases, and in others starvation. (Putney):—(*a*) Another woman; (*b*) sometimes living with another man, but never a good woman. *Nottingham* (Nottingham):—Sometimes disastrous to both, but more often in the case of the man. *Wiltshire* (Salisbury):—(*a*) They lose sense of responsibility; (*b*) ditto. (Winchester):—(*a*) Tends to immorality; (*b*) ditto. *Worcester* (Worcester):—My opinion is that legal separation tends to strengthen the feeling of the marriage tie, as the wife feels husband is bound to support her as long as she remains moral. *Wales—Glamorgan* (Llandaff):—Unless they return after a short interval, each finds new partner. (Cardiff):—(*a*) A lessening of the sanctity of the marriage tie; (*b*) ditto. (Barry):—Bad in many cases owing to the fact that the separation has been forced on the husband or wife, often through drunken habits of partner. *Yorkshire* (York):—(*a*) Immorality with housekeeper; (*b*) destitution causing woman to live with any man who offers a home for herself and children. (Hull):—(*a*) Bad; (*b*) bad. That is all on Question 4."

233. The returns from a number of the magistrates' clerks put in by Mr. J. R. Roberts, Appendix VI., p. 46 *et seq.*, have a question in column 7: "Has it been proved or is "there reason to suppose that the grant of orders of separation leads to immorality?" This question is answered in the negative by the majority of the clerks to whom the questions were addressed; by some in the affirmative; by others that they have no proof, or have no knowledge, or no evidence. It seems probable that the answers by these persons are largely based on applications to set aside orders on the ground of the wife's adultery, which are not very numerous, and do not give the result of experience based on inquiries as to what actually happens to the parties. These answers are inconsistent with the answers made to the Mothers' Union, above set out, and with the evidence of many of the witnesses; *see* especially the evidence of the police court missionaries: T. Holmes (17,829); R. Holmes (18,012, 18,028–9); Joseph E. Bladon (18,148); John Palin (18,219); J. C. Holmes (18,372); W. Lightfoot (18,543–4); H. Ferris Pike (18,648); W. Mundin (18,850–1); F. W. Barnett (19,217); J. Massey (19,390); W. Fitzsimmons (19,503 *et seq.*). *See also* the evidence of Miss J. M. Tooke (19,894 *et seq.*); Miss B. Leppington (19,970); Miss Morton (20,034); Miss E. Lidgett (20,127); all which evidence, based on actual experience, shows how, if separation is continued, unlawful connections are formed on both sides.

234. Our conclusion is that the remedy of judicial separation is an unnatural and unsatisfactory remedy, leading to evil consequences, and that it is inadequate, in cases where married life has become practically impossible.

235. It may be here noted that the annual average of petitions for judicial separation, filed in the years 1906–1910 is only 75·8, and the annual average of decrees of judicial separation granted in those years is only 25·2. For 1910 the number of these petitions filed was 58, and of decrees for judicial separation granted was 22. Probably, in many of the cases, deeds are entered into; and deeds are entered into in a number of cases without suit.* The annual average of petitions for divorce filed is, for the years 1906–1910, 777·8, and of decrees granted 638·8. The number of these petitions filed in 1910 was 755, and the number of decrees granted was 588. For these figures, *see* Civil Judicial Statistics for 1910, p. 29. We have given above (p. 67) a table of the number of separation orders for 1907, 1908, and 1909, among the classes to whom the remedy of divorce is not so accessible as in the case of those in better circumstances.

Dissolution of Marriage.

236. We pass then from our consideration of judicial separation, and, having pointed out the inadequate and unsatisfactory nature of that remedy, we proceed to consider the question of the right remedy.

237. It would not, in our opinion, be possible to recommend the abolition of the remedy of judicial separation, which may be needed in cases where the petitioner does not desire to obtain a divorce and objects thereto, and the respondent does not claim that the decree should be one of divorce. But apart from this, the question may be thus stated: Is it better, while recognising the normal permanency of the marriage bond, to recognise also the deficiencies of human nature and their consequences, and, in the interests of morality and the State and of the parties and their children, to permit of the dissolution of the legal tie where the objects of its formation are frustrated? Or is it better to declare the marriage tie legally indissoluble in every case, notwithstanding the fact that events have supervened upon marriage which have in fact ended the joint life, and notwithstanding that in such circumstances adulterous relations are formed, great suffering and misery inflicted on innocent people and their children, and a general disregard of the law developed, by maintaining a legal tie, when the actual tie has ceased to exist?

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* The annual average of these petitions for the years—

1885–9	was 128·2,	1900–4	was 95·4,
1890–4	„ 104·6,	1905–9	„ 82·6,
1895–9	„ 99·0,	1906–10	„ 75·8,

and of decrees of judicial separation granted, the annual average for the years—

1885–9	was 43·6,	1900–4	was 23·0,
1890–4	„ 29·4,	1905–9	„ 25·8,
1895–9	„ 31·2,	1906–10	„ 25·2.

238. If we start with the fact that the Western world has recognised that the union between man and woman in marriage should, in the best interests of all concerned, be monogamous and that a monogamous union ought to be continuous until the death of one of the parties, yet experience teaches that causes, other than death, do in fact intervene to make continuous married life practically impossible and to frustrate the objects with which the union was formed. We have to deal with human nature as it always has been, and as it is: and it is established beyond all question that for various reasons, amongst others improvident, reckless and early marriages, drunkenness, sensuality, brutality, immorality, lunacy, and crime, many marriages become absolute failures, and married life becomes either morally or physically, or both morally and physically impossible. We have had before us a great body of evidence from witnesses, and a very large number of letters which show that, unless the union formed by marriages which have already ceased in fact can be dissolved in law, lives become hopelessly miserable, illegal unions are formed, immorality results, and illegitimate children are born. This is not adequately understood by those whose lives are passed in happier circumstances; but it will be realised by anyone who reads the evidence laid before this Commission.

239. The great mass of the evidence is in favour of extension of grounds, though there are differences as to what causes should be made grounds. But some witnesses are against any extension, and they may be divided into three classes:—

(1) Those who, on religious grounds, regard marriage as absolutely indissoluble, as, for instance, Roman Catholics.
(2) Those who, on similar grounds, regard marriage as dissoluble only on one ground—adultery.
(3) Those who are adverse to extension of grounds, not on any religious principle, but for social reasons, that is, that any extension of grounds would be adverse to the interest of the State and morality.

240. If it be once decided that other grave causes for divorce, besides adultery, may be added, it is difficult to give much weight, on the question of what causes ought to be added, to the first two classes of witnesses, because, although they may consider any extension adverse to civil and moral as well as religious interests, it is difficult, if not impossible, for them to regard the matter apart from their religious views, which naturally lead them to look upon anything inconsistent with such views as contrary to the best interests of society.

As against these witnesses, we may repeat what we have already stated, that it is one of the most striking features of the evidence which has been taken by the Commission that theological difficulties have weighed little with the great mass of the witnesses, and among those who feel them there are differences of opinion.

With regard to those witnesses who fall under the third category they are in a very small minority.

241. The fear of those who would treat the marriage tie as indissoluble, or would oppose any extension of the present grounds for divorce, is that the stability of the marriage tie in general would be adversely affected and that there would be a general lowering of the standard of morality. We believe that this fear is groundless, that it ignores the actual experiences of life, and that, if it were strictly acted on, it would perpetuate the evil results produced by the present state of the law. The remedy of divorce is at present, as we have shown, practically inaccessible to the poorer classes, and the evidence before the Commission shows that this state of things does not tend to develop due regard for marriage, but the reverse.

Conclusions.

242. In considering what law should be laid down in the best interest of the whole community, the State should be guided by two principles:—

(1) No law should be so harsh as to lead to its common disregard.
(2) No law should be so lax as to lessen the regard for the sanctity of marriage.

243. It appears to us that those who allow the vague fear of possible injury to morality to exclude all other considerations act in conflict with the first principle. The alternative is to recognise human needs, that divorce is not a disease but a remedy for

a disease, that homes are not broken up by a court but by causes to which we have already sufficiently referred, and that the law should be such as would give relief where serious causes intervene, which are generally and properly recognised as leading to the break-up of married life. If a reasonable law, based upon human needs, be adopted, we think that the standard of morality will be raised and regard for the sanctity of marriage increased. Public opinion will be far more severe upon those who refuse to conform to a reasonable law than it is, when that law is generally regarded (as we infer from the evidence) as too harsh, and as not meeting the necessities of life.

244. Thus we are led to consider what are the causes which the State ought to recognise as sufficient to warrant the dissolution of the marriage tie. We see no serious difficulty in determining what should be regarded as such causes. Some witnesses appear to have laboured under the apprehension that this Commission might recommend that divorce should be granted for "trivial reasons." It is obvious that to make any such recommendation would be repugnant to the principles which we have already indicated, because it would lead to dissolutions being granted without any real necessity, instead of being granted only on adequate grounds of human needs.

Consideration of suggested Causes for Divorce.

245. We do not recommend the Legislature to permit of the dissolution of marriage for other than very grave causes. If once an attempt be made to proceed beyond this principle, marriage would practically become a union which would be merely continued at will. Upon that subject we make certain comments hereafter.

246. The causes which have been suggested to us, in the course of the evidence, as justifying the Legislature in providing for the dissolution of marriage, are the following:—

(1) Adultery.
(2) Bigamy.
(3) Wilful desertion.
(4) Cruelty.
(5) Incurable insanity.
(6) Habitual drunkenness.
(7) Long-continued imprisonment.
(8) Disease.
(9) Unconquerable aversion.
(10) Mutual consent.
(11) Refusal to perform conjugal duties.

We proceed to consider each of these suggested causes by itself.

247.—(1) *Adultery.*—This cause has always, as far as we can trace it in history, been recognised as justifying the complainant in putting an end to the marriage tie; we are omitting for the moment the additional charges in a suit by a wife. The ecclesiastical courts have always recognised this ground as justifying a decree of judicial separation, and it was recognised as a ground of divorce in England throughout the whole period of the private Acts of Parliament, and by the Legislature in the Act of 1857.

The basis upon which the courts and the Legislature have proceeded, apart from any scriptural doctrine, appears to us to be that faithfulness to the marriage vow, which involves the sexual union of two people, is an essential feature of the union.

We consider also that the term adultery should include (1) sodomy; (2) bestiality; (3) any other unnatural offences. The first two of these are specially mentioned in the Act of 1857, but seem hardly wide enough to cover certain other offences which need not be particularly specified.

248.—(2) *Bigamy.*—In some countries bigamy is a ground for divorce. In England, a wife may obtain a divorce on the ground of bigamy with adultery, but if the grounds are made the same for men and women, proof of adultery alone will be sufficient. Bigamy is a criminal offence, for which the offender may be convicted and punished, but adultery is a matrimonial offence. If adultery can be proved in the ordinary way, it seems unnecessary to suggest making bigamy *per se* a ground of divorce.

In some cases a bigamous marriage may be easily proved, but mere proof of bigamy is not sufficient; evidence, from which the fact of adultery can be found, has to be given. It might be suggested that subsequent adultery with the person, with whom a bigamous marriage is contracted, might be inferred from the mere fact of such marriage without further proof, because it is reasonable to infer from a bigamous marriage that it has been followed by sexual intercourse. But the court only infers the fact from circumstances, which lead to it by fair inference as a necessary conclusion, and we think it may be assumed that slight evidence of misconduct, after proof of a bigamous marriage, would be acted on. We do not recommend the introduction of a new rule as to proof of adultery.

We think that it is unnecessary that bigamy should be made a separate ground of divorce.

249.—(3) *Wilful Desertion.*—Desertion is at present a ground for a sentence of judicial separation, and may be obtained by either the husband or the wife. The desertion must be wilful, without the consent or against the will of the other party, and without reasonable cause for two years and upwards. Wilful desertion for four years was confirmed by Statute as a ground of divorce in Scotland in 1573, and although that Statute required certain preliminaries before a decree could be obtained, these preliminaries were abolished by the Conjugal Rights (Scotland) Amendment Act, 1861, so that, on the lapse of four years of wilful and malicious desertion, a deserted spouse may at once institute an action without any further proceedings. An account of the Statute of 1573 is given by Lord Salvesen in his evidence, and the right given by it has existed until the present day without any attempt to do away with it, and it gives satisfaction to the people in Scotland. It has not been suggested that it is productive of any effects adverse to the general morality of the nation.

This ground of divorce was recognised by the Westminster Confession of Faith, which was adopted by the Church of Scotland in 1647 and ratified in substantially the same form by Act of the Scottish Parliament, May 26th, 1690. (Acts of Parliaments of Scotland, Vol. IX., p. 128, and appendix to Vol. IX., p. 147.) A copy of the article on this point as ratified by Parliament is as follows:—

> "In the case of adultery after marriage, it is lawfull for the innocent party to sue out a divorce, and after the divorce to marry another, as if the offending party were dead.
>
> "Although the corruption of man be such, as is apt to study arguments, unduly to put asunder those whom God hath joyned together in marriage, yet nothing but adultery, or such wilfull desertion as can noways be remedied by the Church or civil magistrate, is cause sufficient of dissolving the bond of marriage, wherein a publick and orderly course of proceding is to be observed, and the persons concerned in it, not left to their own wills and discretion in their own case." (Chap. 24, ss. 5, 6.)

250. The number of decrees of divorce, granted in Scotland for adultery from 1898–1908 and for desertion during that period respectively, are given by Lord Salvesen (6208, 6213), from which it appears that the total number of decrees for desertion is less than the total number of decrees for adultery. Lord Salvesen says that, relatively to the population, there has been a decrease in the aforesaid 10 years. There appears to be nothing in these tables to justify the fears of those who fear the effect of divorce being granted for desertion. On the contrary, while these decrees on the ground of desertion have no doubt remedied very serious grievances, no abuse of this right appears to exist, nor does there seem any reason to suppose that any abuse of it would be found in England.

251. In 1892 the Bill referred to on p. 87 was introduced into the House of Commons to make desertion without reasonable excuse for four years and upwards a ground of divorce, but, as we have already stated, after being read a first time, it was not proceeded with. (*See also* the evidence of Earl Russell as to the Bills introduced by him 42,339 *et seq.*)

252. In the following countries, in addition to Scotland, desertion is expressly made a ground of divorce, namely: Austria (for Protestants), Hungary, Bulgaria, Denmark, Germany, The Netherlands, Russia, Sweden, Switzerland, Cape Province, Natal, New Zealand, New South Wales, and Victoria. In Greece it is not a ground of

divorce, nor in the following colonies: Queensland, Tasmania, South Australia, and Canada. In Belgium and Roumania there is divorce by mutual consent, so that desertion as a ground becomes unnecessary, and Norway has a new law, the terms of which will be found in Appendix V., p. 43.

253. A large majority of the witnesses, who gave evidence on this point, were in favour of establishing wilful desertion as a ground of divorce.

254. The main reason for introducing this cause as a ground of divorce is that wilful desertion, persisted in, breaks up a home even more than an act of adultery. A great deal of evidence has been given before us as to the cases in which desertion takes place, and one of the spouses disappears to a British Colony, or a foreign country, and cannot be traced. The position of a wife deserted by her husband is particularly hard. A husband may depart with another woman, and it may require considerable expense to trace him, expense quite beyond the means of the wife. If she could trace him, she would almost inevitably find that he was living with another woman, and would under the present law, if she could prove it, obtain a divorce, on the ground of desertion and adultery. In fact, in cases of desertion adultery might usually be presumed. Wife and children under such circumstances may be living without any means of support. An unfortunate woman with a large family is left practically in the position of indigent widowhood until her husband dies, and even then she may not be able legally to prove his death. A husband's position, deserted by his wife, is perhaps not so common, but is sufficiently common to be a serious grievance, and his position is practically the same, with regard to the difficulty of proof of anything further than desertion. If he be a poor man, he is left without anyone to look after his home or his children. In both cases, the results appear to be almost inevitable, that other relationships are formed.

The letters to which we have previously referred (p. 47) from persons dealing with their own individual cases contain instances where husband or wife has been deserted for periods ranging from two to thirty years, and offer illustrations of the above statement.

255. The principal objection to desertion as a ground of divorce is that the deserting spouse may return. But that objection does not avail in cases of judicial separation, where, although the parties may reunite, they can only do so by mutual agreement, and consequently, if the desertion has been wilful and has lasted for a considerable time, immoral ties are likely to be formed after an interval by the deserted spouse. In those cases of practically permanent desertion, although in some cases parties may rejoin, as a general rule it will be found that the home once definitely broken up is not re-formed.

256. Another objection was that more scope for collusion will be given, if this ground be adopted. The answer to that objection is that no such difficulty has been found in Scotland, nor has anything been brought to our attention that suggests that it creates difficulty in any foreign country. It seems not reasonable to assume that this result will take place, if desertion is only a ground of divorce after an interval of a lengthy period. Moreover, the judge trying the case ought to be satisfied that the desertion is wilful and not by consent, and should require satisfactory proof to that effect, and if he feel any doubt on the subject, the papers can be sent to the King's Proctor for investigation before decree absolute. And safeguards against any impropriety exist in the powers of the court, after divorce, to order payments to be made to the wife for her maintenance, and to resettle any property which has been settled. It is suggested in a further part of this Report (p. 134), that these powers should be extended.

257. We recommend that wilful desertion, without the consent or against the will of the other party, and without reasonable cause, should be a ground for divorce.

258. If our recommendation be adopted, the question then arises, for what period the desertion should run. The period of four years in Scotland was fixed more than 300 years ago, at a time when communication was difficult. Different periods are to be found in the different codes of other countries; in Germany the period is one year. If we were only considering cases in which wealthy people were concerned, it might be reasonable to impose a term of not less than four years, but, when we

have to keep in view those in poor circumstances, time becomes of the utmost importance, because of the necessity for as early as possible simplifying the position of the deserted spouse, especially in the case of women.

259. Our conclusion is that, in view of modern means of communication, the period ought to be three years. We think it would follow that the present period of two years, to constitute desertion which will give ground for a judicial separation, should be made to correspond with the period of three years.* We deal hereafter with means of process for maintenance, &c. during this period.

260. There have been various decisions as to what in fact amounts to desertion, and we do not find it necessary to comment thereon, but we may notice that it has been considered that wilful refusal to permit of marital intercourse without reasonable excuse, may put an end to cohabitation and amount to desertion. It should be clearly expressed that such refusal should be treated as amounting to desertion, and, if persisted in for the period aforesaid, should be ground either for divorce or for judicial separation. (*See* the case of *Synge* v. *Synge*, L.R. [1900], P. 180 ; [1901], P. 317.)

261.—(4) *Cruelty.*—Cruelty is a ground on which a sentence of judicial separation may be obtained either by the husband or the wife, and, if such a sentence can be obtained, we are of opinion that divorce is the proper remedy, and we recommend that this cause ought to be added as a ground of divorce.

262. Cruelty is a ground of divorce in Austria, Hungary, Belgium, Bulgaria, France, Roumania, Russia, Switzerland, New South Wales, and Victoria ; and in Sweden, Germany, and Greece, attempts on the life of the applicant are a ground of divorce, which come under the general head of cruelty.

263. Many of the witnesses have referred to the effect of cruelty, and a large number of instances have been given. We may refer to the illustrative cases disclosed in the letters we have received, some of which are set out in Appendix XXVI., p. 172 *et seq.* It seems shocking that a woman, for instance, is bound to remain the wife of a man, who has been guilty of such gross cruelty towards her that it is absolutely unsafe for her, as regards life or health, to continue to live with him. A remarkable instance of this is afforded in cases of men compelling their wives to prostitute themselves for the husband's maintenance—cases by no means uncommon. (*See* the evidence of Mr. J. Pedder of the Home Office (40,960 *et seq.*) of Mr. Wansbrough (17,375–17,380) and of Mr. Palin (18,249–52).)

264. Communication of venereal disease, knowingly or negligently, has always been regarded as cruelty, and we refer to the medical evidence given before us on this subject, especially that of Mr. J. Astley Bloxam, consulting surgeon to the Charing Cross Hospital and the Lock Hospital. The witnesses do not differ as to the results of both syphilis and gonorrhœa in producing sterility, and illness, and other serious effects on parties and their children, and the disastrous consequences which arise where such a contamination has occurred. We can conceive no cause which more fully justifies an application for divorce than this class of cruelty.

265. We have already (p. 71) given a definition of cruelty as follows :—

> Cruelty is such conduct by one married person to the other party to the marriage as makes it unsafe, having regard to the risk of life, limb, or health, bodily or mental, for the latter to continue to live with the former.

It may be said that, even with this definition, the courts have been apt to allow of the finding of cruelty in cases where the cruelty is of a trifling character. The explanation of this is that the alleged cruelty is usually associated with a charge of adultery made by a wife, and if that charge is proved, slight evidence of cruelty is permitted to pass to give a ground of divorce. But if each of these causes become a ground of divorce, the temptation to take this course will be removed.

The danger which arises in France from the permission of divorce for " sévices " or " injures graves," pointed out by Monsieur Mesnil (43,054 *et seq.*), which are construed in a very wide sense, is eliminated by requiring that the cruelty shall be dangerous to life, limb, or health, before it can be allowed as a ground of divorce.

NOTE.—In view of the statement on page 1, as to the late Sir George White's concurrence in substance with this Report, it is right to mention that he voted in favour of a period of two years.

Objection is made that the parties may come together again. But if cruelty be such conduct as makes it unsafe, having regard to the risk of life, limb, or health, mental or bodily, for the applicant to continue to live with the other party, and that position is established by adequate evidence, it seems only reasonable that the tie which permits of such disaster should be finally sundered, not merely in the interests of the complainant, but in many cases also in the interests of children.

266. We recommend that, for this purpose, this definition of cruelty should be adopted; that cases of cruelty should include the cases mentioned on p. 71 under the head of our observations on the jurisdiction of courts of summary jurisdiction, and that the proof required in those cases, as there mentioned, should be sufficient in the cases in which a divorce is asked.

267. (5) *Incurable Insanity.*—We have now to consider insanity as a ground of divorce. The question raised is of great importance, and has not been considered by any commission in this country, although the hardships resulting are well known and have been frequently discussed. The evidence given before us and the communications received by us prove these hardships and the disastrous moral effects inseparable from the present state of the law.

268. We have hitherto dealt with causes based upon the misconduct of one of the parties to a marriage, and it has been suggested that a new principle is introduced, if the ground, on which dissolution of marriage is sought, is the result of misfortune, and that, in any view, a marriage ought only to be dissolved, on the ground of marital misconduct.

But this suggestion is based on a misconception, arising from a narrow view of marriage as a mere contract, and from treating a suit for dissolution of marriage as if it were an action for damages, or penalties for wrongful breach of contract. It is not a mere contract. It is a relationship, voluntarily entered into by agreement between a man and a woman, for purposes which are well recognised, and such relationship is regarded as creating a status resulting from the joint life, which alters the position of the parties towards each other and the community. A suit for dissolution is not brought merely on account of wrongful conduct of a party, but on the ground that by reason of such conduct the marital relationship has become practically impossible of continuance, and the purposes for which it was entered into have been frustrated. Even looked at from a contractual point of view, the case falls within the class of cases in which contracts, the performance of which has become impossible by the occurrence of matters not contemplated by the parties, may in certain circumstances be regarded as no longer binding. Naturally, when the results are produced by the misconduct of one party, the right to treat the relationship as at an end rests with the other. The decree of dissolution in effect merely declares that that relationship (the continuance of which has become practically impossible, and the purposes, for the formation of which it was entered into, have been frustrated), is to be regarded as legally at an end.

When two persons enter into the married relationship, they may reasonably be supposed to contemplate the continuance of that relationship during their joint lives with the objects to which we have already referred, and with the risk of the ordinary vicissitudes, changes and troubles of life which everyone has to expect, and which fall within the reasonable meaning of the expression "for better for worse." Those ordinary vicissitudes, changes, and troubles may affect the comfort and happiness of the parties, and interfere to a varying extent with one or more of the objects aforesaid, but they do not bring the married relationship to an end *de facto*, nor render it practically impossible of continuance.

But persons marrying cannot reasonably be supposed to contemplate the continuance of the relationship becoming impossible, the joint life determined, and the objects aforesaid wholly frustrated by reason of misconduct or otherwise.

Misconduct is not the only ground which has this latter effect. If the marital relationship becomes impossible of continuance by reason of insanity, all the difficulties which we have pointed out in this report, arise. Indeed incurable insanity is more effective in determining the relationship than any of the other causes which we have recommended as grounds of divorce. In cases of incurable insanity the married relationship has ended as if the unfortunate insane person were dead, and the objects with which it was formed have become thenceforward wholly frustrated.

It seems unreasonable to suppose that two persons, about to be married, contemplate that their joint life will be determined by the incurable insanity of one of them, who must be confined in an asylum or other establishment for the reception and care of lunatics for the remainder of his or her life, and that, notwithstanding, they are to be held bound to the tie, when it has become impossible to perform any of the duties associated with it. In incurable cases, the permanent separation of the parties, under the provisions of the Lunacy Acts, has the same practical effect on the marriage tie as the order of judicial separation in other cases.

269. Dr. Robert Jones, whose qualifications and experience are given by him (34,231), and who has visited asylums in Russia, Poland, Norway, Germany, Austria, Switzerland, Italy, and France, states the position with regard to insanity thus (*ib.*) :—

> "*Nature of Marriage.*—It implies a contract, but in the insanity of one party to the contract, that party is unable to fulfil its obligations, and is moreover unable, owing to derangement of reason, to consent to annul the contract. The State steps in and 'restrains' the sufferer against his will. It takes its own will and imposes it upon him, it disposes of his property, releases him from certain obligations, but binds him in matrimony to the detriment of his family and the State.
>
> "Under analogous conditions the State consents to the nullity of a marriage, when by physical infirmity one of the parties to the contract is unable to perform its required duties—bodily incapacity existing at the time of the marriage and proved to be incurable.
>
> "Insanity is a physical disease, and it implies mental disabilities also; it is moreover, one which deprives the sufferer of his liberty, of his civil rights, of his social, financial, political, and even of his domestic rights, and a person united in the bonds of matrimony to a chronic and incurable lunatic is for all practical as well as legal purposes one united to a dead person, for by the nature of his physical condition he is not only unable to direct the life of another, but is unable even to control his own. The marriage contract is ended by death, and should similarly and for the same reason be ended by confirmed insanity, which is social and domestic extinction. The insane to-day are under better hygienic conditions and live longer; the grievance is, therefore, all the greater.
>
> "It is against the interest of the struggling partner and of the family to be thus bound. They should have the option by law of another chance of mating with a healthy person."

270. It was said that to allow of insanity as a ground of divorce would lead to other cases of disease being made grounds, such, for instance, as paralysis, malignant disease, and phthisis. This is not a sound suggestion. With the exception of leprosy, which now happily need not be considered in England, insanity considered in relation to the marriage tie, occupies a unique position, which serves to distinguish it from every other disorder of the body.

The incurably insane have usually to be removed from their own homes, and are confined and isolated in an asylum or recognised establishment, and anything approaching family life is impossible. The position of persons suffering from other diseases is quite different. Moreover, the incurably insane are incapable of carrying out any of the obligations incident to marriage, though in a few cases they may be capable of fulfilling the physiological obligation of marriage; they are, in fact, as if they were non-existent. Subjects of other maladies may be still companionable, and capable of managing the affairs of their households, able to associate with other persons, and of fulfilling a considerable proportion of their marriage duties: and they remain capable of receiving in the ordinary way the care and attention of their married partner, and others by whom they are surrounded. So far as public opinion is concerned, the sympathy of most people would be extended to the young husband or wife about to divorce an insane spouse who no longer even appreciates or recognises his or her existence, whereas most people would condemn anyone who attempted to divorce his or her partner for paralysis or consumption.

271. The evidence taken by us on this subject included that of a number of persons of great experience, whose names we have above set out in the list of witnesses. These witnesses gave their statements with much detail of facts and figures. We give what appear to us to be the main points to be gathered from the evidence. Sir Thomas Clouston, Dr. Robert Jones, and Dr. Hyslop were nominated to give evidence by the

British Medical Association, as practitioners recognised by the profession as competent, in respect of their experience and general qualifications, to represent to us not their individual opinions only, but the present state of medical knowledge upon the subject with which they deal. We understood that these gentlemen did not speak as actual representatives of the Medical Association though nominated by it, but gave their evidence upon their own responsibility from their large experience. Sir James Crichton-Browne, while expressing the belief that the majority of the British Medical Association, numbering some 25,000 medical men, might agree with the views expressed by these three gentlemen, stated that there would be a very strong body of opinion on the opposite side (34,950–1).

272. There are about 150,000 registered insane persons in the United Kingdom; of this number probably some 60,000 or 70,000 are married. Sir Thomas Clouston, of Edinburgh, whose qualifications and large experience are well known and will be found stated (34,020), and upon whose evidence we place much reliance, estimates (34,026) that should incurable mental disease or defect become a ground for divorce, some 41,000 married persons might be affected by the change in the law, the exact number depending on the number of years detention which might be fixed. Dr. Coupland, one of the Commissioners in Lunacy, gives tables bearing on the point (Vol. III., pp. 74–6), and states that it may "be fairly concluded that about 90 per "cent. of those detained in asylums are the subjects of chronic and probably incurable "forms of insanity, the remaining tenth forming a fluctuating community" (35,115). He estimates, roughly, that in 65 asylums about 40,000 cases would be incurable, of which half, or rather less than half, are cases of married people (35,119–20). Dr. Robert Jones states (34,240) that there are 8,000 persons, more than half of whom are married, between the ages of 25 and 50, incurably insane in the county of London alone. Sir James Crichton-Browne, the Lord Chancellor's Visitor, however, gives calculations from which he estimates that the married persons who remained in asylums after five years would be 34,800, and he states that he should not be surprised if the number of those affected by a change in the law of divorce fell under 15,000 (34,952).

It is impossible to estimate how many persons would desire to take advantage of a change in the law in order to obtain divorce for insanity, but it is clear that a large number of persons would have the opportunity of doing so.

273. Of the 150,000 registered insane, about 50,000 (*i.e.*, one-third of the whole) are, according to Sir Thomas Clouston, the subjects of incurable secondary dementia. He also states that there are about 4,000 persons suffering from what he terms "gross organic brain diseases," accompanied usually with paralysis or aphasia, the great majority being incurable, but that these patients are mostly past middle life, and the question of divorce would not be likely to come up in most of these cases. Also that there are about 2,000 or 3,000 persons, suffering from general paralysis of the insane at present found to be incurable, but its average duration from the beginning till the patient dies is only about three years. Out of the large number of epileptics in the United Kingdom, there are some 7,000 to 10,000, to one-third of whom (being married) any change in the divorce law might apply, the disease being practically incurable (34,024).

He states that there are some 30,000 or 40,000 persons classed as the high-grade or "congenitally feeble-minded" in the Report of the Royal Commission on the Feeble-minded (one-half being females) who would come under the scope of any divorce law (34,024), but it does not seem clear how many of these are included in the aforesaid 150,000 registered persons.

He also estimates (34,026) that there are 20,000 incurable alcoholic cases to which divorce proceedings might apply, half of them being married. He also mentions persons suffering from delusional insanity, and about 1,000 cases of recurring insanity in asylums, half being married, and cases of senile dementia. Dr. Coupland, one of the Commissioners in Lunacy, gives figures from which it appears that cases of delusional insanity represent 10 per cent. of the total number of the insane, and senile dementia 3·4 per cent.

274. With regard to recovery, two-thirds of the inmates of asylums may be regarded as incurable (Dr. Coupland, 35,119). The average percentage of recoveries in asylums is between 33 and 35 per cent. of the admissions; of this percentage 10 may be

expected to relapse and 25 to remain out of the asylums (Dr. Marriott Cooke, a Commissioner in Lunacy, 35,385–86).

Dr. Coupland (35,114) shows that of those who recover—

88·8 per cent. recover within the first 2 years,
9·1 „ „ in from 3 to 5 years,
1·6 „ „ „ 5 to 10 years,
0·5 „ „ „ 11 to 20 years.

Sir Thomas Clouston (34,026) gives figures relating to 13,172 patients sent to the Royal Edinburgh Asylum in the 35 years 1874–1908 inclusive. 36·4 per cent. recovered.

Of these recoveries—

2·9 per cent. took place after 3 years.
1·2 „ „ „ 5 „
0·2 „ „ „ 10 „
0·1 „ „ „ 15 „
0·08 „ „ „ 20 „

Of examples of recovery after 20 years he records only four instances out of nearly 5,000 cases of recovery. Of puerperal insanity it is affirmed that 80 per cent. recover, while the rest usually become demented (34,141).

In the matter of the ages of the married insane, Dr. Coupland gives the following table (35,107)—

—	Age.	Males.	Females.
Married insane - - - -	At 20 to 44 years	43·6 per cent.	56·0 per cent.
	„ 45 „ 64 „	45·3 „ „	37·8 „ „
	„ 65 and over	11·1 „ „	6·2 „ „

275. In the following countries insanity is a ground for divorce:—Germany, Norway, Sweden, Switzerland, New Zealand, Bulgaria, Denmark, Russia. In the first four, the insanity must be of three years' duration and incurable. In New Zealand, the respondent must have been confined as a lunatic for a period or periods not less in the aggregate than 10 years, within 12 years immediately preceding the filing of the petition, and be unlikely to recover (16,026). In the other three countries, no details are forthcoming. It has only been adopted in a few states of the United States, and does not appear as a ground of divorce in the aforesaid Model Law (p. 27).

276. Thirty medical witnesses appeared before the Commission. To 10 of these the question as to insanity was not put; of the remaining 20, 12 were in favour of making insanity a ground for divorce, 7 were against the proposal, and 1 was undecided (34,547). Two of the medical witnesses, who were in favour of the proposal, based their conclusion almost entirely on the ground of eugenics (Dr. Rentoul and Dr. David Walsh). Of the 11 specialists in mental diseases among the above number, 4 were in favour of insanity as a ground, while 7 were against. Sir George Savage (35,976) obtained from 82 medical officers of asylums answers to the question, "Is insanity a justifiable ground for divorce?" Of these, 51 were in favour of insanity being a ground, 29 were against the proposal, and two were indifferent. Certain of those who replied in the negative did so on religious grounds. Of the total number of medical men whose opinions have been obtained, 63 were in favour of insanity as a ground, while 36 were against. The majority of the non-medical witnesses who dealt with this point, were in favour of making insanity a ground.

277. We do not think that the different opinions which are found among the witnesses, whether medical or not, arise from any practical dispute as to facts, but rather from differences of opinion as to policy and upon religious matters.

278. The attitude of certain specialists in mental disease towards the present question calls for some comment. In the first place exception is taken by them to any legislation, which would place insanity in a category distinct from that of any other disease. Dr. W. D. Moore considers such action, if taken, would be a "retrograde step" (41,059). It is only within comparatively recent times that lunacy has been scientifically studied and treated. It was at one period regarded not as a disease,

but as a demoniacal possession, the manifestations of which were to be ruthlessly restrained. The lunatic was treated not as a sick man but as a common brawler, and was locked up as being a disturber of the peace and a public nuisance. Upon the acceptance of insanity as a disease, there followed its treatment upon scientific lines, and upon those humane principles which underlie the treatment of other disorders. The alienist naturally protests against any measures which will place insanity once more in a position apart from that occupied by other maladies, and, among such measures, he ranks the proposal to treat insanity as a ground for divorce. This view will be found expressed in the evidence of Dr. W. D. Moore (41,059, 41,064), and Dr. E. M. Cooke (35,373).

Then again, the medical officer of an asylum properly considers the interests of his patients as the first concern in any legislation dealing with the insane, and would be disposed to object to any enactment, which might prejudice in any way the welfare and comfort of those under his charge. This attitude is made evident in the examination of several of the witnesses.

The Commissioner in Lunacy is officially "the guardian of the insane" (35,138). His duty is to protect the interests of the insane. As Dr. Coupland (35,143) expresses it, he "holds a brief for the insane," and under these circumstances a Commissioner could hardly be expected to favour any action which would, in his opinion, be possibly unfavourable to those for whom he is responsible.

279. Sir James Crichton-Browne expressed himself as opposed to divorce altogether on any ground and under any circumstances (34,986, 35,011–2).

His main grounds (apart from religious objections) for opposing divorce on the ground of insanity appear to be (34,967 *et seq.*) that it would reduce the care and caution with which the marriage ceremony is entered into; that in his experience there is no demand for it; that amongst the poor it would be chiefly sought for the purpose of getting rid of the cost of maintenance, and that (this was his strongest point) it was a disease, and if it was admitted as a ground, he could not see why other diseases should not be admitted. We differ from the witness with regard to the first ground which is matter of opinion, and consider the opposite effect would be produced. With regard to the second, we hold that it is contrary to the weight of the evidence from the other experts, and to the general evidence given before us, and to the communications we have received. With regard to the third ground, we point out elsewhere that. if the applicant can bear the cost of maintenance, the decree can be made subject to provisions being made for its payment. And with regard to the last ground, we have already (p. 101) dealt with the broad distinction between incurable insanity and any other disease.

280. It was suggested that it may be difficult to determine the fact that a patient is absolutely incurable, and that conflicting medical evidence might leave the question uncertain. The evidence clearly shows that, if a time limit be given, the difficulty becomes almost negligible, and there appears to be no reason to suppose that, if the ground is confined to *lunacy pronounced incurable after five years continuous confinement*, any real difficulty would arise.

281. The figures already given of the percentages of recoveries, as estimated in periods of years, show how insignificant is the risk of error in the case of those who have been continuously insane for over three years, and although it was asserted that persons had recovered after 20 years' confinement in an asylum, it should be added that the number of those who recover after 10 years is not more than 0·5 per cent. Sir George Savage, whose position and experience are well known, and who is opposed to making insanity a ground of divorce, states that if five years be allowed and a definite medical inquiry be held, the risk of miscarriage will be almost negligible (35,985), and would not involve one case in a thousand (35,997). As to whether there have been instances where a patient has recovered after being divorced for insanity, it is stated that in Saxony these cases have been very few, while in Prussia such a case has never happened (34,944: V. (*b*)).

282. It may be said that poor persons could not afford to pay for the special medical evidence demanded in these cases, and that an insane person might be undefended, or possibly defended by the children who might place themselves in opposition to that parent who was endeavouring to obtain a divorce; but with regard to persons in the position of the poor who might have difficulty, our proposal hereafter (p. 107) as to expert evidence seems to meet these difficulties.

283. It was also suggested that the knowledge that insanity might be a ground of divorce would affect married persons of poor health or unstable mental condition, and might hurry them into actual insanity, especially in cases of puerperal insanity, (35,911, 41,059, 41,113), and that such knowledge might act prejudicially to some insane persons and might hinder their recovery and possibly aggravate their mental condition (34,957, 35,866, 35,868, 41,059), also that certain of the insane, notably those subject to delusional insanity, would most deeply resent divorce proceedings (34,024), and would be caused mental torture by the knowledge that divorce was possible (41,059), and that an additional terror might be added to the stigma of insanity.

In answer to these suggestions, certain of the eminent specialists, who have given evidence, contradict the suggestion that knowledge that insanity may be a ground of divorce would cause a person of unstable mind to become an actual lunatic (*see* the evidence of Dr. Hyslop, 34,422; Sir Thomas Clouston, 34,043, 34,107; and Dr. Jones 34,309).

As to the likelihood of resentment of divorce proceedings affecting the mental condition, Dr. Coupland's tables show that examples of delusional insanity only represent 10 per cent. of the total number of the insane. As to the general question, Dr. Mott does not think that the possibility of divorce would have an injurious effect on the insane (35,720), and from his inquiries he says that German physicians do not think that the divorce law of Germany acts to the detriment of the lunatic *qua* lunatic (35,726), and Sir George Savage's view of this question of injury to the insane is that it is a possibility, but not a serious one. Dr. Robert Jones considers "that it would "have no effect in the way of precipitating insanity from borderland cases" (34,309).

284. Suggestions that making insanity a ground of divorce might in some cases have an injurious effect on patients seem to arise from omitting to consider that only incurable insanity, found to be such after a long period of confinement, would be likely to be recommended as a ground, and that such a recommendation should remove any apprehensions with regard to those whose confinement is of short duration, or whose cases have any reasonable prospect of recovery.

285. Minor suggestions on this large question were made to us as to the position of a patient divorced, and as to the possibility of suits being brought to avoid paying for the maintenance of insane persons. But the court should have power to withhold its decree, unless adequate provision were made for the maintenance of the insane person, or such maintenance were provided under the provisions of the Lunacy Acts.

286. When this question is looked at broadly, it has to be observed that there are a great number of married persons in the United Kingdom who are hopelessly insane. Among these the largest class is composed of those suffering from secondary dementia. Of such it is said that they "have no proper interest in life, are quite unable to care "for themselves or to manage their affairs." This condition, when fully established, is absolutely incurable, while most of those patients live for many years. They "have so lost the power of proper feeling that the fact of their divorce would make "no painful impression on their minds, or no impression at all" (34,022). "Their "own affection for their relations is perverted or dead" (34,030). They "are for the "most part incapable of deriving any comfort from the visits of their friends" (34,049). To them their wives or husbands are as strangers, and indeed, these subjects of dementia are, except in a physiological sense, "practically dead" (34,224, 34,277). With regard to the marriage contract they are unable to understand it, to remember it, to fulfil its obligations, or to consent to annul it. Even their property is disposed of for them, while at the same time they are kept in close and compulsory confinement. It is contended that the hopelessly insane are, as parties to any contract, practically non-existing.

Sir Thomas Clouston says: "I have met with large numbers of such cases who "have become insane soon after marriage; some have had children, and both those "children and the sane husbands or wives have suffered extreme personal, social and "family hardship thereby" (34,022).

Dr. Robert Jones says (34,232): "I know numerous instances (which I could "quote) where either the husband or the wife has become insane within a few weeks "or months (in some instances within a few days) of marriage, and in whose case

" there is not the slightest prospect (humanly speaking) of ultimate recovery." He also points out the injurious consequences to the individual, the family, the race, and the State, and the immorality and other evil effects of there being no right of divorce for incurable insanity. We refer to this evidence, 34,232 *et seq.*, and to 34,261–7.

287. In certain cases of those confined on the ground of insanity death may ensue before the limit of time suggested has arrived; in other cases there may be recovery or no reasonable certainty that the case is hopeless; in others there may be alternations of sanity and insanity, which would not permit of continuous confinement. But if the remedy of divorce be confined to cases in which (1) married life has become impossible owing to the hopelessly incurable condition of the patient, and (2) that condition is established after the termination of a lengthy period, we conceive that no injustice will be done, while, on the other hand, great hardship and evil consequences will be averted or removed.

288. In cases of insanity among married people, great hardships may be inflicted upon the sane spouse, and immorality in various forms may ensue. When the insanity is incurable, the sane spouse is not only denied the enjoyments and advantages of married life, but is condemned—often whilst still young—to a compulsory celibacy which may extend to the end of his or her days. The sane spouse is unable to add healthy legitimate children to the State and continue the family name. The poor man, whose wife is in an asylum for life, must find a housekeeper to manage his home, and take care of his children. The woman, who is deprived of her husband, loses a protector and supporter. As a result, irregular unions, immorality, and the production of illegitimate children are inevitable. The wife may in some instances be driven to prostitution, the children of the legitimate union are apt to be neglected, and the economic troubles incident to the support of two families may be acute. There is no doubt that the hardships which are inevitable when a husband or wife is confined for life in an asylum, tell more hardly upon the poor than upon the rich, and that the demand for relief in a large series of cases is very pressing.

289. We have given anxious consideration to this important subject, and we are satisfied that it will be to the interests of the parties affected by cases of lunacy, to the interests of their children and of the State and morality, that insanity should be introduced as a ground of divorce, subject to the following limitations.

290. We recommend that the insanity, which should form a ground of divorce, should be certified as incurable, and that the insane spouse should have been continuously confined, under the provisions of the Lunacy Acts for the time being in force, for not less than five years. Under these Acts confinement of an insane person may be in various places, such as an asylum, an institution for lunatics, a workhouse, a hospital, licensed premises, and in authorised private hands (*see* ss. 4–38 of the Act of 1890), and changes may be made in the places in which the confinement takes place. Our recommendations would permit of the period running in whatever place or places the lunatic was confined under the Acts.

291. It is to be particularly observed that there are two conditions: (1) incurability; (2) a period of time must elapse. Even after the lapse of that period it would not follow that the first condition could be fulfilled, and that it was fulfilled would have to be established by evidence to the satisfaction of the court.

The provision that the confinement must be continuous should be so expressed that continuity would not be interrupted by an escape or other transitory occurrence, the patient remaining still registered as insane.

Such cases as general paralysis of the insane, recoverable puerperal insanity, and certain other cases would not, in effect, be included in the cases to which our recommendations would apply. Either by death or recovery, they would not be cases of incurable insanity, remaining after five years' confinement.

292. We further recommend that the insanity should be found to be incurable to the satisfaction of the court, and that this ground should only operate when the age of the insane person is, if a woman, not over 50 years, and if a man, not over 60 years. The last recommendation would exclude the case of senile dementia, and cases where

there is no reasonable ground for dissolving the marriage, having regard to the age of the parties.

293. We further recommend, that, in all cases of a suit for divorce on the ground of insanity, the initial proceedings shall be served on the King's Proctor, who shall thereupon communicate with the Lunacy Commissioners, who may, in their discretion, instruct him to take such steps, if any, as they think desirable to see that the case is properly defended, and to bring before the court any material matters; and the necessary powers should be conferred on the Commissioners and the King's Proctor for this purpose, and the necessary provisions made as to the costs of the King's Proctor and Lunacy Commissioners, which should be costs of their offices, unless they are recovered from the applicant.

294. We further recommend that the court should have power to permit, if it thought fit, the intervention of a relative, or a trustee of any will or settlement under which the respondent should be interested, or other person whom the court in its discretion considered should be allowed to intervene; the intervention to be upon such terms as the court might think just.

295. We also think that certain provisions should be introduced, analogous to those which are adopted by the court with regard to cases of nullity on the ground of impotence. For the purpose of these cases, there are attached to the court medical experts; a report by two such experts is required in nullity cases, based on impotence, and is laid before the court, and one or both of the experts, as may be necessary, have to be called as witnesses, but at present no special provision is made for their expenses in poor cases. We recommend that for the purpose of dealing with insanity cases medical experts should be appointed by the court or other competent authority, and that the experts' fees should be paid by the applicant, except where the court should otherwise order. These expenses should form part of the establishment expenses of the court, if the judge certifies that the party requiring to call them has not sufficient means for the purpose.

We suggest that a definite fee might be fixed at the time of the general appointment of the experts for these poor cases. This question of providing money, where the party has no means, will be one for the consideration of the Legislature. Cases of impotence might be similarly dealt with.

296. With regard to defences, besides a denial and such other defences as may be applicable, it is suggested that cases will have to be considered where insanity has been brought about by the misconduct of the petitioner, and that in some cases the husband's conduct has been the "immediate and direct cause of the wife's insanity" (41,057; *see also* 35,911). It is said, "some insane patients are made "insane by sexual perversions of their marital partners" (34,401). Probably these cases would not come within those incurable after five years, but if they did, it should be a sufficient answer to prove that the insanity was brought about by the petitioner. It might be difficult to prove this, but this difficulty, if it should arise, is not enough to weigh against the general considerations in favour of divorce on the ground of insanity.

297. We think that, before concluding our remarks on the subject of insanity, we should refer to the evidence which has been given before us upon principles of eugenics. Sir Thomas Clouston says: "I and a very considerable number of the medical profession "and of scientists, interested in what is now called eugenics, regret that the scope "of the enquiry of this Commission could not have included questions relating to "the marriage of persons with an extremely bad mental and nervous heredity, with "criminality, and with positive signs of degeneration, and the prevention of fatherhood "and motherhood on the part of those almost certain to produce a diseased and bad "stock of citizens in the future. Many of us feel that the prevention of mental "disease and of imbecility would also imply the prevention of much vice, criminality, "and ineffectiveness among our citizens" (34,030).

There is a considerable body of medical and other evidence from the eugenic point of view. It is directed to two main points. The first is the desirability, in the interests of the race and the State, that persons, who are unfit to enter into the state of matrimony and propagate healthy children, on account either of mental or physical infirmity, should not be permitted to do so. The second is that, in the same interests,

measures should be taken to prevent intercourse between married persons who become unfit to have healthy children for similar reasons.

We do not think that questions affecting the formation of marriage and the laws which should govern its formation are within the scope of our inquiry, though later on we shall notice some points connected with these questions which fall within our inquiry. We therefore only draw attention to the great importance of the first point.

With regard to the second point, although from the national point of view its importance is equally great, yet it seems to go beyond the questions directly involved in divorce, the right to which, in our opinion, rests upon the practical impossibility of the continuance of married life, and the frustration of its objects. It involves the consideration of the proper course to take, where these results do not follow, as, for instance, cases in which a person is insane at one time, but has long intervals of sanity. In these cases as between the parties, married life, though interrupted, is not completely ended nor all its objects frustrated.

298. These points, while deserving careful consideration, and possibly action with regard to them, are directed to the prevention of the propagation of a degenerate race, and do not appear to us to fall strictly within the consideration of the law and its administration in divorce and matrimonial causes.

299. We think it desirable to call attention to certain defects, which it is said exist in the Lunacy Acts, on the following points, namely:—

(1) That the sane spouse can obtain the release from an asylum of the insane spouse before convalescence is fully established, in defiance of medical opinion opposed to such release. (*See* 34,232, 34,280–3.)
(2) That patients subject to recurrent insanity are allowed out of confinement during the intervals between the attacks, and in such intervals, may, if married, resume marital relations. (*See* 34,234, 34,401.)
(3) That married patients, allowed out of asylums on probation, are allowed to resume marital relations while still on probation.
(4) That there are no provisions by which a person, whose sanity is open to question, can be restrained from cohabitation against the wish of the other party.

It does not seem to be within our province to make any specific recommendations upon the above matters, which involve the amendment of the Lunacy Acts, rather than any questions submitted to us for the purpose of inquiry and report.

300.—(6) *Habitual Drunkenness.*—This is a ground at present for a separation order in favour either of a husband or a wife under the Licensing Act, 1902, but the High Court has no jurisdiction to grant a separation upon this ground. This latter point will be dealt with under the head of amendments of the present powers and practice of the court (Question VII., p. 116). Here it will be sufficient to mention that, although cases amongst the well-to-do classes are probably not so frequent as amongst the lower, the High Court should have this jurisdiction, just as much as courts of summary jurisdiction.

301. Drunkenness is a ground of divorce in the following countries:—Bulgaria, Sweden, New Zealand, New South Wales, and Victoria, and in certain other countries the provisions of their laws, as to separation followed by divorce, may practically cover this ground.

302. It is the view of all the witnesses examined on this point that the use of alcohol to excess is a source of misery of the most serious character. Some of them place drunkenness as being at the root of most of the trouble in married life. But no suggestions have been made to make drunkenness *per se* a ground either of separation or divorce; all proposals relate to cases of habitual drunkenness.

303. It seems probable from the evidence given before us that habitual drunkenness produces as much, if not more, misery, for the sober partner and the children of a marriage, as any other cause in the list of grave causes. Such inebriety carries with it loss of interest in surroundings, loss of self-respect, neglect of duty, personal uncleanliness, neglect of children, violence, delusions of suspicion, a tendency to

indecent behaviour, and a general state which makes companionship impossible. This applies to both sexes, but in the case of a drunken husband, the physical pain of brute force is often added to the mental and moral injury he inflicts upon his wife; moreover, by neglect of business and wanton expenditure, he has power to reduce himself and those dependent upon him to penury. In the case of a drunken wife neglect of home duties and of the care of the children, waste of means, pawning and selling possessions, and many attendant evils, produce a most deplorable state of things. In both cases the ruin of the children can be traced to the evil parental example. The same remarks apply to the abuse of drugs other than alcohol, such as morphia, cocaine, &c. (*See* Dr. Branthwaite's evidence, 41,309–12.)

304. At present, the parties may be permanently separated by order of a court of summary jurisdiction on the ground of habitual drunkenness as defined in the Act of 1879, as we have already stated. But examination into this matter, in which we have been assisted by the evidence of Dr. Branthwaite, His Majesty's Inspector under the Inebriates Act, has led us to the conclusion that the law with regard to separation by order is in a very unsatisfactory condition.

305. In the first place, we consider that the definition suggested by Dr. Branthwaite already given above (p. 71) should be adopted.

306. Then we notice that the order is obtained upon evidence of a state of things which exists at the time of the order, without any regard to previous conditions, or any provisions for subsequent modification or termination, and even when, previous to application for separation, no adequate effort may have been made to control the respondent in the use of drink, or to rescue him or her from drinking habits. No obligation is laid upon anyone to make any such effort after separation, and no provision is made for the modification of the order in case of subsequent improvement in the state of things existing at the time of separation. (Section 7 of the Act of 1895 gives certain powers to the court to alter, vary, or discharge an order, but it is understood that those powers have not been regarded as wide enough to meet the point referred to.) The result of the order is that the respondent is practically turned adrift, without anyone to look after him or her, and without any effort being made to redeem him or her. The matter is looked at solely from the point of view of the applicant, and without any consideration, from a general public point of view, of what ought to be done for the inebriate, in the interests of his family and of the State. The case of the inebriate wife, and the case of the inebriate husband, are fully stated by Dr. Branthwaite (41,309–12).

307. In our opinion, an order of separation, on the ground of habitual drunkenness, should still be possible, so that immediate relief may be afforded to the sober spouse; but such order should be granted on definite conditions, and should be of a temporary character only. No separation order should be granted unless the applicant can satisfy a court of summary jurisdiction that such proper means as were at his or her command have been used to bring about the reform of the drunken spouse, and that the habitual drunkenness has not been brought about by the applicant. No separation order should be granted by such court for a longer period than two years.

308. During the currency of such order, the court making the order should have power to compel the inebriate to submit himself or herself to treatment or control on the lines recommended by the Departmental Committee on the Inebriates Acts in 1908. The means used by the court would range from a compulsory pledge of abstinence to guardianship or compulsory committal to an institution for the treatment of inebriates, the severity of the means employed being dependent upon the success or failure of milder measures.

309. A husband may, notwithstanding his drunken habits, be capable of earning some means. In that case we think that the application for committal should require the consent of the wife, reliance being placed, as an alternative, upon any other suitable arrangement or treatment likely to bring about the reform of the drunkard, such as medical care, friendly control, or compulsory guardianship. The difficulty of carrying out this suggestion would be generally the question of means, but we think power might be given, when there are means to provide for the inebriate's treatment, control or maintenance; that is to say, when the applicant can find the means, the order might be made. If, however, there are no means for that purpose, there will be difficulty on

the part of the court in making the order. It then becomes a question for the Legislature to determine, whether in such cases the State or local authorities should provide the means necessary for the purpose in the public interest, and in that of the offender, his wife, and children. A drunken person without means, separated from the influence of a sober spouse, especially if that person be a woman, is likely to become a permanent burden upon public funds as an inmate either of a workhouse, inebriate reformatory, prison or asylum, unless some strenuous effort is made at reform. In his report for the year 1909 under the Inebriates Acts, 1879 to 1900, Dr. Branthwaite states on p. 7 that "it is highly probable that from 97 to 98 per "cent. of all persons in the kingdom who become habitual drunkards, die drunkards; "or become (more or less permanent) inmates of workhouses, prisons, or asylums." It seems reasonable to assume that some expenditure from public sources directed to reform might save a considerable amount of permanent burden.

310. It is with the poorer classes that a court has generally to deal in this matter, and the application should be made to the court of summary jurisdiction, if payment of not more than 2*l.* per week is required, but to the High Court where a larger sum is needed.

311. Then comes the question what ought to be done, if the applicant can provide no means, and the Legislature does not provide for assistance by the State or local authorities. In that case, we still think that only a temporary order of separation should be made in the first instance, so as, at any rate, to give an opportunity to the offender of redeeming himself or herself.

312. Following out the scheme which we have already suggested as to the duration of the orders of the court of summary jurisdiction, we think, as just stated, that the duration of a temporary order by the court of summary jurisdiction should in no case exceed two years. If the temporary order does not prove effective, an application should be made to the High Court of the district for an order to continue the former order, if the court considers that a further period of probation would be productive of advantage, and to continue or repeat the treatment or detention of the offender for such time as the court thinks fit, not exceeding a period which would expire at the end of three years from the first order made on the ground of habitual drunkenness, the question of means being dealt with in the same way as already suggested.

313. If at the expiration of three years from the first order of separation there is no reasonable prospect that the drunkenness of the respondent will be effectively cured, and of the resumption of joint married life, then, upon application made for that purpose, the High Court should be entitled to grant a decree of judicial separation, or of divorce, on the principles which we have already indicated. According to the evidence which we have had before us, a case of drunkenness, after such a time as aforesaid, may be regarded as hopeless and incurable, and the married life is in fact determined. The position is as serious as that in which a respondent has deserted the applicant for three years, or is an incurable lunatic.

314. If, at the end of three years the respondent is still a habitual drunkard, but the court is not satisfied that the case is hopeless, it should have power to continue the order, if necessary, until the position becomes such as to enable the court to dispose of the case finally by decree of divorce, or judicial separation, or discharge of the order.

315. Whilst we are strongly of opinion that permanent separation now allowed by law should be replaced by divorce whenever incurability is proved, we desire to emphasize the necessity for the employment during temporary separation of every available means for reform, and to suggest that, whenever possible, these means for reform should include detention, for periods of not less than twelve months in the aggregate, in some institution specifically designated and licensed for the purpose, before incurability may be considered as proven.

316.—(7) *Long-continued Imprisonment.*—The question of whether divorce should be granted in cases of imprisonment for long terms is practically confined to sentences of penal servitude. Expressions of opinion for and against this as a ground of divorce have been given by various witnesses amongst whom were Mr. Basil Home Thomson,

secretary to the Prison Commission; Dr. John Benson Cooke, principal medical officer of His Majesty's prison at Wakefield; Dr. William Henry Winder, governor of the prison at Aylesbury; Dr. Oliver Fereira Naylor Treadwell, medical officer of the convict prison at Parkhurst, and medical superintendent of the asylum at Parkhurst; and Mrs. Mary Hodder, visitor for the Church Army in the department which concerns prisoners' wives and families.

317. The law makes sentence for crime a ground of divorce in Austria, Hungary, Belgium, Bulgaria, Denmark, France, The Netherlands, Norway, Roumania, Russia, Sweden, Switzerland, New Zealand, New South Wales, Victoria. The details, such as the length of sentence, will be found in the statement already given of the laws of these countries.

318. The following table from the Criminal Judicial Statistics for 1910 for England and Wales, published in 1912, shows the number of persons undergoing such sentence and the length of sentence of convicts in prison on the 31st December of the former year :—

TABLE XLI.—CONVICTS.—*Length of Sentences of Convicts in Prison on the 31st December* 1910.

(1) Length of Sentence.	Total Number.			Period actually served.								Number of those included in the foregoing Columns who, in addition to Sentence of Penal Servitude, are liable to serve Remanet of former Sentences.				(17) Court-Martial Convicts. (Not included in the preceding Columns.)
	(2) Total.	(3) Males.	(4) Females.	(5) 1 Year and under.	(6) 2 Years and above 1.	(7) 3 Years and above 2.	(8) 5 Years and above 3.	(9) 10 Years and above 5.	(10) 15 Years and above 10.	(11) 20 Years and above 15.	(12) Above 20 Years.	(13) Total Number.	Length of Remanet. (14) 1 Year and under.	(15) 2 Years and above 1.	(16) Over 2 Years.	
Life { Commuted death sentences.	113	98	15	13	11	7	23	40	16	3	—	—	—	—	—	—
Life { Original sentences	20	20	—	1	—	—	2	5	9	3	—	—	—	—	—	2
20 years - - -	35	34	1	1	1	—	5	17	11	—	—	—	—	—	—	—
15 „ - - -	70	69	1	3	7	1	10	45	4	—	—	1	—	1	—	1
14 „ - - -	14	14	—	—	2	—	3	8	1	—	—	1	—	1	—	—
12 „ - - -	37	35	2	3	3	4	7	20	—	—	—	2	—	—	2	—
10 „ - - -	167	158	9	13	21	25	39	69	—	—	—	15	2	8	5	2
9 „ - - -	6	6	—	1	1	—	2	2	—	—	—	2	—	2	—	—
8 „ - - -	33	33	—	3	6	5	13	6	—	—	—	9	2	5	2	—
7 „ - - -	288	285	3	35	51	66	105	31	—	—	—	55	21	30	4	1
6 „ - - -	61	61	—	14	15	7	25	—	—	—	—	16	8	6	2	—
5 „ - - -	908	889	19	197	226	250	232	3	—	—	—	143	77	58	8	6
4½ „ - - -	4	4	—	3	—	—	1	—	—	—	—	1	1	—	—	—
4 „ - - -	259	256	3	81	71	94	13	—	—	—	—	46	26	16	4	1
3½ „ - - -	34	34	—	8	13	11	2	—	—	—	—	5	4	1	—	—
3 „ - - -	1,482	1,430	52	655	630	194	2	1	—	—	—	246	144	83	19	5
Revoked or forfeited licences only. { over 2 years	15	15	—	9	4	1	—	1	—	—	—	—	—	—	—	—
Revoked or forfeited licences only. { 2 years and over 1.	48	45	3	43	5	—	—	—	—	—	—	—	—	—	—	—
Revoked or forfeited licences only. { 1 year and under.	76	72	4	76	—	—	—	—	—	—	—	—	—	—	—	—
Total - -	3,670	3,558	112	1,159	1,067	665	484	248	41	6	—	542	285	211	46	18

From this table it will be seen that out of a total of 3,670 convicts, 3,175 had been sentenced for seven years and under.

The following table supplied to us by Mr. H. B. Simpson, C.B., of the Home Office, shows the number of prisoners sentenced as habitual criminals under the Prevention of Crimes Act, 1908, up to the 15th May 1911 :—

	Males.	Females.
Number sentenced to date - - - -	242	3
Quashed by court - - - -	6	—
Special licence granted - - - -	1	—
Suicide - - - - - -	1	—
Remitted by Secretary of State - - -	3	—

319. Amongst the witnesses, who expressed views upon the question of imprisonment for long periods being a ground of divorce, there was a great difference of opinion. With regard to those who had special experience, Mr. Thomson stated :—

"40,480. Then you have made an additional note?—'On 6th August, a circular 'was addressed to 27 persons who have had experience of convict prisons, 'including the governors, chaplains and medical officers of all the convict 'prisons, inviting their views, supported if possible with actual instances '"showing the hardship or the advantage of maintaining the marriage relation '"when the husband or wife is undergoing a long term of penal detention." 'Of these 27, 3 gave no opinion; 7 were in favour of a long sentence being a 'ground for divorce, and 17 were against it.'

"40,481. Now can you give a summary of, first, those in favour of a long sentence being a ground; and then, secondly, the reasons of the 17 that were against it. Can you summarise it? I believe you have a memorandum which Captain Wilmot sent which summarises it. If you have not got it, it does not matter?—No, I have not got it, my Lord. Out of the 17 against it, I think all the chaplains were against it on religious grounds.

"40,482. That is what I want. Can you tell me how many of the 17 were chaplains?—I think nine, my Lord. By going into the other room I could get the actual figures.

"40,483. Perhaps you had better?—(*After a short pause.*) Eight were chaplains, my Lord.

"40,484. Do they base their views on religious grounds?—Yes, nearly all of them."

The evidence of the Lord Chief Justice was strongly adverse to making imprisonment, in any case, a ground of divorce (15,525–8).

320. It was said that it might be considered a hardship, if the liability to a divorce were added to a criminal sentence, and that it would thus become, as it were, a part of the punishment, and this might probably have an effect upon the sentence passed. This consideration is especially applicable to prisoners of the "star class," that is to say, prisoners who have never been previously convicted, and who are not habitual criminals, or of corrupt habits.

It was pointed out that, at least with short sentences, it may reasonably be expected that it would be a powerful influence upon married prisoners to be able to look forward to rejoining their spouses and families. This consideration is of great importance, when we bear in mind the modern trend of dealing with criminals, which is, while adequately employing punishment as a deterrent, at the same time, if possible, to produce reform of the criminal. It will also be observed that the number of those who are confined for periods above seven years is small, and that, of the persons so confined, there would probably not be a large number of married prisoners. We have not found it possible to ascertain how many prisoners are married.

321. Our conclusion after careful and anxious consideration of this point is, that with one exception, imprisonment should not be a ground of divorce.

322. We think that exception should be made in the case of a person who has been condemned to death, and whose sentence has been commuted to that of penal servitude for life. But for the commutation of the sentence there would, in fact, have been a dissolution of the marriage tie, and cases of this kind involve imprisonment for life, with any such reduction as good behaviour and other circumstances may warrant.

323.—(8) *Disease.*—In some countries, certain contagious diseases are regarded as grounds of divorce, such, for instance, as venereal disease and leprosy. In this country we need not consider the case of leprosy, which arises in certain countries and requires compulsory separation, for practically it is not met with here. With regard to venereal disease, it is unnecessary to make it a ground, for, if acquired after marriage, it is usually proof of adultery, for which a divorce can be obtained against a wife, and, if our recommendation be adopted, it would be obtainable against a husband without proof of any other cause. If acquired before marriage, and then existing and not disclosed, we think that suggestions which we make hereafter (p. 118) under the head of nullity of marriage, if adopted, would meet the case.

324.—(9) *Unconquerable Aversion*, or what is termed *incompatibility of temper.* This receives support from some writers and from some evidence, and is to be found in some foreign laws. The observations of Bentham, in his "Theory of Legislation," (4th edition, p. 221 *et seq.*), are deserving of study. It is said by some that, in this country, attention is too exclusively directed to physical grievances, that consideration of the psychical side of the married relationship is neglected, and that incompatibility may produce almost as much hardship as physical acts. It is enough to say that satisfactory definition is practicable in the one case, whereas in the other it is impossible for any court to separate incompatibility from mutual consent.

325.—(10) *Mutual Consent.*—Some persons consider this as the only solution of the difficulties of married life under the conditions of modern civilisation; and divorce at the will of one party, subject to suitable restrictions, has even been advocated by others. These suggestions have met with little support from any of the numerous witnesses who have been called before us, and are not likely to meet with any substantial support at the present day in England. This and the previous cause are not recognised as necessarily putting an end *de facto* to married life, as do the causes to which we have already referred.

Accordingly, we do not recommend these two causes as grounds of divorce.

326.—(11) *Refusal to perform Conjugal Duties.*—If the refusal results from incompetence, a decree of nullity may be had. If it is simply wilful, and there has been no intercourse, the court has, in some cases, regarded the refusal as evidence of incompetence, and pronounced a decree of nullity. We think that wilful refusal, where there has been no intercourse, should be made a ground of nullity, without the indirect method of inferring incompetence.

327. But if there has been intercourse and then refusal to continue without reasonable cause, this course could not be adopted. We have already suggested that refusal to permit of intercourse, without adequate reason, if persisted in for three years, should be treated as desertion. We recommend that refusal without reasonable cause to perform conjugal duties, where there has been no intercourse, should be made a ground of nullity, and that when there has been intercourse and such persistent refusal as aforesaid, desertion may be held established. We understand that in some cases refusal has been allowed to be used as a ground of defence, namely, where desertion is alleged to have taken place, and this ground is alleged as a reasonable cause for the desertion, or where a respondent is charged with adultery and alleges refusal of conjugal rights as a defence, as amounting to desertion, or where a suit is for restitution of conjugal rights and this ground is set up as a defence justifying such refusal. But, if necessary, this should be so declared.

328. With regard to what is reasonable cause, we may add that this is not capable of definition which will cover all possible cases, but we have already referred (p. 72) to the way in which it is and should be dealt with, in that part of our Report which deals with the magistrates' jurisdiction. It seems to be sufficient to leave this point to be dealt with in a similar manner.

Conclusion.

329. We recommend, as grounds for dissolving marriage :—

(1) Adultery (including in the term the acts above mentioned).
(2) Wilful desertion for three years and upwards.
(3) Cruelty.
(4) Incurable Insanity, after five years' confinement.
(5) Habitual Drunkenness, found incurable after three years from first order.
(6) Imprisonment under commuted death sentence.

PART XVI.

QUESTION VII.—ARE ANY OTHER, AND IF ANY OTHER, WHAT AMENDMENTS NEEDED IN THE LAW, PROCEDURE, AND PRACTICE RELATING TO DIVORCE, NULLITY OF MARRIAGE, AND OTHER MATRIMONIAL QUESTIONS?

330. Under this head, a number of questions require consideration—questions which relate to jurisdiction of the court, changes in the law which may be desirable, and certain detailed matters of procedure and practice.

CHAPTER I.

JURISDICTION AND LAW.

331.—(1) *Jurisdiction as affected by Domicil.*—Jurisdiction in divorce is exercised by the English court, in the case of parties who are domiciled in this country. The domicil of the parties is that of the husband. The wife, after marriage, has the domicil of her husband. If the parties, even though British subjects, are not domiciled in England, the court does not exercise jurisdiction in divorce, but leaves them to proceed in the courts of the country in which they are domiciled. If the parties are of foreign nationality, but are domiciled in this country, the court will exercise its jurisdiction. It was at one time considered that residence of the parties in the country was sufficient for the purpose of founding jurisdiction, unless it were of a mere passing character (*see Niboyet* v. *Niboyet* (L.R. 4 P.D. 1)), but the law has been clearly settled, principally by the case of *Le Mesurier* v. *Le Mesurier*, (1895), A.C. 517, that domicil and not residence is the test.

332. In the ordinary case, these principles do not cause inconvenience, for (although the domicil is in some cases a matter of doubt, the factor of intention entering into the consideration of the matter) most cases are those of English people, about whose domicil there is no question.

333. There are, however, many cases in which a divorce may be claimed, where jurisdiction based on domicil presents difficulties. Some of these require special attention.

334. There is a difficulty affecting numerous persons, whose domicil is English but whose work in professions or businesses requires them to reside for long periods abroad. We cannot make any suggestions as to these cases, where the residence is in a foreign country: British persons domiciled in England, but resident in a foreign country, must proceed in England, for in those countries which proceed on the principle of domicil, they would be unable to obtain relief, and in those which proceed on nationality, their nationality would be in the way.

335. But a grievance has been pointed out to us with regard to English men and women, who are domiciled in England, but are resident in India, the Colonies, or any British possessions. According to our law, a divorce suit between such persons must be brought in England, and, although there are British courts in the place of their residence, those courts cannot pronounce a decree, which will be recognised in England, although the decree may be recognised in the place of residence. Many of these people have neither the means, nor the time, to leave their place of residence and proceed with their cases in England. Difficulties of this character were pointed out to us by the Right Hon. Ameer Ali and the Chief Justice of Hong Kong. It is suggested that persons in this position might have their cases disposed of in the place of their residence, and that the decree might be registered in the Divorce court in England, if made upon grounds recognised in England, and that, upon such registration, it should become operative as a decree nisi in both countries.

336. It would not be difficult to introduce into legislation for the United Kingdom a provision for the purpose of carrying this suggestion into effect, but, to become effective, changes to carry it out would be required in the laws affecting other parts of the British Empire, to enable their courts to assist in it. If the Indian or Colonial or

other British courts were authorised to act between parties resident within their jurisdiction, subject to their decree becoming operative on registration in the court of the domicil, the necessary changes would not be difficult. Another suggestion to meet this difficulty is the following: parties to an English suit must either give the evidence in the English court here, or by means of a commission. If they are resident, say in India, it seems absurd that the proceedings should be in England and the evidence taken in India on commission. A means could be provided for the courts of the residence, at request from the court in England, to try the case where the parties and their witnesses reside, and to send the record home for decree.

337. Many of the difficulties, which surround the subject of jurisdiction, may, according to some jurists, be removed by adopting the principle of nationality, instead of that of domicil, so that the courts of a nation should exercise the jurisdiction over its subjects wherever they are domiciled.

We venture to suggest that the time is not ripe for making a recommendation on the subject of such a change. The principal reason for this is that there is no uniform national law for British subjects. England, Scotland, Ireland, the Channel Islands, India, and the Colonies all have different laws on the subject of divorce, and so long as these diversities are allowed to remain, it will be necessary to inquire into the question to which part of the Empire the parties belong, in other words, where they are domiciled, and, further, it may be more convenient to proceed in the country of domicil than in the country of nationality.

338. We also refer to one amendment suggested by the Right Hon. Ameer Ali, that is, altering the law which confines the jurisdiction of the courts in India to cases where the parties have been married in India.

The suggestion is that the restriction to marriages contracted in India should be removed, so that, so long as the court has proper jurisdiction over the parties, its powers should be exercisable, whether the marriage took place in India or elsewhere. But we think we ought to notice that, unless the parties are domiciled in India, the decrees of the court there are not recognised in England as dissolving the marriage.

339. We therefore recommend generally that British subjects should be permitted to have their cases tried in the place of their residence within the British Dominions, and that the decree, when registered in the place of the domicil, be operative as if made there, if made on grounds permitted by the law of the domicil.

340. If a case coming under this recommendation should be heard in England, we recommend that the trial should be in London in the Probate, Divorce, and Admiralty Division of the High Court.

341. Whether the above recommendations be adopted to the full extent or not, we suggest, as to India, that the courts there should have power to hear proceedings, if within their jurisdiction, even if the parties have not been, as at present required, married in India.

342. We are aware that some of these recommendations and suggestions are outside the strict scope of our inquiry, but the position of British subjects domiciled in England and resident elsewhere in the Empire is, in our opinion, within the terms of our Commission, and we have thought it right to point to matters which show that the general position of British subjects is not satisfactory, and will not be so, until it is placed on a more Imperial basis.

343.—(2) *Jurisdiction where Wife deserted, &c.*—As the wife's domicil is, according to our law, that of her husband, it follows that in strictness if he deserts her, and proceeds abroad with the intention of acquiring a new domicil, he can defeat her case unless some provision be made to protect her. Most if not all the cases of this kind have been undefended cases, and the difficulty has been got over by adopting the view, in order that justice may be done, either that the husband cannot be permitted to say in such a case that he has changed his domicil, or perhaps that the wife may be treated as having, by her husband's act, acquired a domicil of her own. The point is referred to by the late Lord Esher (then Lord Justice Brett) in *Niboyet* v. *Niboyet* (L.R. 4 P.D. 14).

344. The question has never been raised in a contested case, and it seems desirable to free the matter from all difficulty by declaring that, where the parties are domiciled within the jurisdiction at the time of the commencement of the desertion, the wife may maintain her suit, as if the domicil remained what it then was. To meet other cases, it should be declared that, if the parties are domiciled in England at the time of an act giving a ground of divorce, no change of domicil since that act should be permitted to oust the jurisdiction of the court founded on such act, if the suit be instituted within a year of the act on which the petition is founded.

345.—(3) *Jurisdiction in cases under the Aliens Act.*—The evidence of Mr. Pedder (Vol. III., p. 393 *et seq.*) shows that, in a considerable number of cases, a foreigner, who has married an English woman, is sent out of the country for criminal offences in circumstances which make the woman unwilling to accompany him. One class of such offences is that of the husband compelling his wife to prostitute herself for his benefit: *see* the Vagrancy Act, 1898 (61 & 62 Vict. c. 39. s. 1 (1, 2, 3)). In such a case, she may have no ground for divorce (though, if cruelty be adopted as a ground of divorce, she would have), but even if she have a ground for divorce, she would not be able to maintain a suit at present, for her husband would not have an English domicil.

346. We recommend that the court should have power to entertain any matrimonial suit of a wife, whose husband has been deported under the provisions of the Aliens Act, which the court would have been able to entertain, if the person so deported were domiciled in England.

347.—(4) *Jurisdiction with regard to Divorce and Separation in cases of Habitual Drunkenness.*—If divorce be given for this cause, jurisdiction to deal with it should be given to the High Court. In any event, jurisdiction to grant a judicial separation for this cause should be given to the High Court. Although cases of separation on this ground may not be common among the well-to-do classes, it seems clear that power to deal with such cases as would not at present be brought before magistrates and justices because of the money limit should be given to the High Court in a similar way, so far as temporary orders are concerned, and by final order, if necessary.

348.—(5) *Jurisdiction in cases of conflict of Laws.*—The case of *Ogden* v. *Ogden*, (L.R. [1908] P. 46), brought prominently forward a serious difficulty produced by the conflict between English and French law. That case followed *Simonin* v. *Mallac* (1860), (2 Sw. & Tr. 67).

The head note to the case is as follows:—

> "In September, 1898, a ceremony of marriage in English form was celebrated in England between a domiciled Englishwoman and P., a domiciled Frenchman. By a decree of the French Court in November, 1901, this marriage was annulled, on the ground that the consent of the parent, as required by French law, had not been obtained. P. subsequently married a Frenchwoman in France. In July, 1903, the Englishwoman instituted a suit in England for the dissolution of her marriage with P. on the ground of his adultery and desertion. This suit was dismissed for want of jurisdiction. In October, 1904, the Englishwoman went through a ceremony of marriage in England with O., a domiciled Englishman, describing herself as a widow:—
>
> "*Held* (following *Simonin* v. *Mallac*, (1860) (2 Sw. & Tr. 67), and *Sottomayer* v. *De Barros*, (1879) (5 P.D. 94), that the lex loci contractus must prevail, and that this later marriage was bigamous and must be annulled at the suit of O.
>
> "Decision of Bargrave Deane J., [1907] P. 107, affirmed.
>
> "*Quære* whether, in circumstances like the present, the Court ought not to have assumed jurisdiction in the wife's suit for the dissolution of her first marriage by treating her as having a domicil in her own country sufficient to support a suit of this kind."

349. The proper remedy appears to be to enact that, where the courts of any other country, in the exercise of jurisdiction conferred upon them by the law of that country, declare a marriage null, the English court shall be at liberty to pronounce it null also, even though it may have been celebrated in accordance with the law of the place of celebration.

350.—(6) *Jurisdiction in Nullity Cases.*—At present, the court has jurisdiction to declare a marriage null in certain cases where the marriage is void or is voidable, as, for

instance, where there has been no marriage by reason of want of consent, or duress, or consanguinity, or prior marriage and spouse living, or where the respondent is impotent. It is immaterial for the present observations to consider which are void, and which voidable.

In England, it is required that, in order to constitute a valid marriage, each of the parties should, as regards age, mental capacity, and otherwise, be capable of contracting marriage; should not by reason of kindred or affinity be within the prohibited degrees; should be unmarried; should freely consent to marry each other, understanding the nature of the contract; and that certain forms and ceremonies should be observed. Misrepresentation, even though fraudulent, or concealment does not, apart from duress or imbecility of mind amounting to insanity, affect the validity of a marriage, to which the parties freely consent, with a knowledge of the nature of the contract. In cases, however, where there is no real consent, as when a person is induced to go through a ceremony of marriage by threats or duress, or in a state of intoxication, or in an erroneous belief as to the ceremony, the marriage is invalid.

It follows that, where a marriage is invalid, it may be decreed null and void, though, if the marriage were between persons under the ages of consent, the marriage would seem only to be voidable and to be capable of ratification, but, except in that class of case which is not met with now-a-days, impotence is the only cause for which a marriage, though not void, may be avoided. If one of the parties be, at the time of marriage, through malformation, or otherwise, in a condition which renders consummation practically impossible the marriage may be avoided by a declaration of nullity by the court in the lifetime of the parties. As a rule, the party who is fit must be the petitioner, though there appear to be some rare exceptions to this rule. (*See* Rayden on "Practice and Law in the Divorce Division," p. 52.)

351. The result is that however much a person may be deceived into marriage by fraudulent statements or concealment of facts by the other party, or however unfit for marriage the other party may be, unless the unfitness amounts to impotence, the marriage is binding. The law on this point was considered by the late Lord St. Helier in the case of *Moss* v. *Moss*, (L.R. [1897], P. 263), a case which will be referred to in the third class of case with which we propose to deal.

Misrepresentations and concealments inducing a marriage are not treated in the same way as frauds inducing an ordinary contract, which can be set aside or dealt with on the footing of damages, for, in marriage, the status is altered and the rights of others may be affected. Moreover, if the courts were to investigate such questions, a flood of litigation might take place.

352. At the same time there are cases, which are analogous to cases of impotence, and in which one party is really unfit to marry, and ought not to do so in the interests of the other party, or of possible children, or of morality. It is eminently desirable that marriages should not take place between persons unfit to marry, and many medical opinions were expressed before us as to the desirability of taking steps to prevent such marriages, and, indeed, we were informed that steps in this direction have already been taken in America.

We do not think that any practical suggestions were made to us on this point.

353. But there are certain classes of case in which a party should, in our opinion, have a right to obtain a decree of nullity, on the ground that the respondent is unfit to marry and has not disclosed the fact, and it is not known to the other party, and where, in the interests of the complaining party, and of possible children, and of the State, and of morality, the marriage should not be held binding.

They are the following:—

(*a*) First, where one of the parties is of unsound mind at the time of marriage, it is said that, both in the interests of the other party and in the interests of possible children and of the State, the latter party should be entitled to claim a declaration of nullity. This is to meet cases where the party, though of unsound mind, is sane enough to be held to have consented, and yet is not sane enough to marry and procreate children. It would not be necessary for such a declaration that there should be proof of concealment. The mental state might be unknown, or undeveloped, until at or shortly after marriage, but the consequences of holding persons to such a marriage may be disastrous to them and to possible children.

We recommend that a party to a marriage should be entitled to petition for a declaration of nullity when the other party, though of sufficient understanding to consent to a marriage, is, at the time of the marriage, either of unsound mind in other respects, or in a state of incipient mental unsoundness, which becomes definite within six months after marriage, and the first party is at the time of the marriage ignorant of the defect; and that this right be limited to cases where the suit is instituted within a year of the celebration of the marriage, and there has been no marital intercourse after discovery of the defect.

We further recommend that where intercourse, taking place before the discovery of the truth, has resulted in the birth of a child, the court should have power to make orders as to the maintenance, custody, and education of any such child.

In order to avoid repetition, we recommend that this last-mentioned power should also apply in the following two cases.

(*b*) A second suggestion was made to us with regard to cases of unfitness for marriage, where one of the parties is subject to epilepsy or to recurrent insanity. As the result of our consideration of the evidence, we recommend that a party to a marriage should be entitled to petition for a declaration of nullity, where the other party is, at the time of marriage, subject to epilepsy or to recurrent insanity, and such fact is concealed by such party or his or her parents or either of them, or anyone who has control over such party and is aware of the intended marriage, from the first party, who remains ignorant of the fact at the time of the marriage; and that this right should be limited to cases where the suit is instituted within a year of the celebration of the marriage, and where there has been no marital intercourse after the discovery of the defect.

(*c*) A third suggestion is that, where one of the parties is at the time of the marriage suffering from a venereal disease, in a communicable form, and the fact is not disclosed by the party or such other person as aforesaid, to the other, who is ignorant of it at the time, the latter party should be entitled to a declaration of nullity. A venereal disease acquired after marriage is practically a ground of divorce, being almost always proof of adultery. According to the evidence and on general grounds, it seems probable that the power to exercise such a right as is suggested in the hands of a complaining party would promote the interests of morality, and also aid the complainant in being able to avoid being subjected to the possibility of contamination to himself or herself or possible children. The medical evidence given before the Commission, particularly that of Mr. J. Astley Bloxam, F.R.C.S., consulting surgeon to the Charing Cross Hospital and the Lock Hospital, as to the prevalence of venereal diseases (syphilis and gonorrhœa), the misery which they occasion, the sterility, and the dire effects upon the injured party, and the consequences to children, proves the importance of every effort being made to prevent or modify these evils. The power which is suggested would have a valuable influence in the direction of morality and of preventing marriage taking place in improper conditions.

Mr. Bloxam's evidence is given in Vol. III., p. 389. Several other medical experts gave evidence much to the same effect as that given by Mr. Bloxam.

We therefore recommend that, where one of the parties at the time of the marriage is suffering from a venereal disease in a communicable form, and the fact is not disclosed by the party or, if they know of it, by his or her parents, or either of them, or anyone who has control over the party and is aware of the intended marriage, to the other party, who remains ignorant of the fact at the time, such other party shall be entitled to obtain a decree annulling the marriage, provided that the suit is instituted within a year of the celebration of the marriage, and there has been no marital intercourse after discovery of the fact aforesaid.

(*d*) A fourth class of case in which a decree of nullity is suggested is where a woman is found to be pregnant at the time of marriage, her condition being due to intercourse with some man other than her husband, and such condition being undisclosed by her to her husband, who is ignorant of the fact at the time of marriage. The point was raised in this class of case as to whether, according to present law, the husband was entitled to a decree of nullity. In the case of *Moss* v. *Moss*, already referred to, the late Lord St. Helier held that he had no power to pronounce a decree. The case is not of frequent occurrence, but that it does occur appears from the evidence of Mr. Priestley, K.C. (4590), and he also states that a decree of nullity may be obtained in such a case in France, Prussia, and Austria (4589). The details of a recent case of this kind have been communicated to us. These cases are of such a

gross and fraudulent character that it seems reasonable to adopt the remedy suggested, provided a suit be brought within a year of the marriage.

354. In some of the cases just mentioned, notwithstanding the actual unfitness for marriage, intercourse may have taken place before discovery of the defect, and such intercourse may result in conception and birth of a child who would, on a decree of nullity, be illegitimate. But this result may not infrequently be met with in other cases, as, for instance, in cases of bigamy. The question of legitimation in the cases aforesaid forms part of the much wider question of legitimation of those who, under the present English law, are illegitimate, but these questions do not fall within the reference to us, and we therefore do not make any recommendation thereon, and must leave them to the consideration of the Legislature.

355.—(7) *Nullity in cases of wilful refusal to perform Conjugal Duties.*—We recommend, for reasons already given (p. 113), that wilful refusal, without reasonable cause, to permit intercourse should, where there has been no intercourse, be made a ground for a decree of nullity.

Chapter II.

Presumption of Death.

356. We have already dealt with the case of wilful desertion, but it seems necessary to consider whether, although parties have separated voluntarily and with the intention of rejoining, prolonged absence, without communication, should not afford ground for relief. In some cases, which have been before the courts, desertion has been inferred from failure to return when applied to, or from other proof, although the separation was not originally effected by malicious desertion. In this case, the desertion is held to run from the time when the separation ought to be put an end to, and is not.

357. Besides these cases, there are cases of not infrequent occurrence in which nothing can be proved except a separation and absence without news for a long time, and in which desertion cannot be proved, and yet the absence is for so long a time that the question of death arises.

At present, after a lapse of seven years, a person re-marrying in good faith cannot be found guilty of bigamy by virtue of the following provision in the Statute (24 & 25 Vict. c. 100. s. 57).

The section of the Statute referred to so far as material is as follows :—

> "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding seven years . . . . . :"
>
> "Provided that nothing in this section contained shall extend . . . . to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time . . . ."

But the second marriage is not valid, if the absentee be in fact alive at the time of its solemnisation.

358. We recommend that a party to a marriage, where the other party thereto has been continually absent from the first party for the space of seven years, and shall not have been known by such party to be living within that time, should be entitled to apply to the court for an order of presumption of death, and, on obtaining such order, should be entitled to contract a valid second marriage.

359. To ensure that such an order as aforesaid is properly obtained, the order should be an order nisi in the first instance, not to be made absolute for, say, six months, during which period the King's Proctor should have liberty to intervene to show cause for holding that the order was obtained by collusion or otherwise not properly obtained, and the person whose death was in question should have the power to come forward, if in existence, and require the order to be discharged, if he or she does so before any other marriage of the person obtaining the order.

360. But this does not meet all the difficulties which arise in cases where persons have disappeared, and are believed to be dead. There are cases, fairly numerous in certain ranks of life, and frequently met with in the Probate Court, where husband or wife, as the case may be, usually the husband, disappears in circumstances which would justify any reasonable person in believing that he or she were dead, and a question arises as to whether the person who has disappeared may be presumed to be dead, in order that property may be dealt with. In that court, the judge is able to direct further inquiries, and to cause notice to be given (for instance to insurance companies) and to authorise parties to act upon the presumption that the person, whose property requires administration and who has disappeared, is dead. This is done on the basis of the facts, without any specification of a limit of time beyond which the application must be made, and the result of an order so obtained is that the property of the person supposed to be deceased may be distributed, as if he were in fact dead. No practical difficulty has been found to arise in the application of this practice in the Probate Court, in cases where either letters of administration or probate of a will is necessary.

361. The suggestion, derived from this practice, is that a party desiring to re-marry in circumstances where it is reasonable for him or her to suppose that the other party to the marriage is dead, might be permitted to apply to the court to obtain a declaration, on the basis of presumption of death, entitling the applicant to re-marry.

The court, upon such a motion, would require to be satisfied that the circumstances of the departure, and the absence of news, and other matters were such as to show that the applicant was acting *bonâ fide* in making the application, and the court should adjourn the application for such time as might be necessary, as is done in the probate cases, to satisfy the court that it might safely make the order.

362. It may be noted that, in addition to the defence under the proviso above mentioned to a charge of bigamy, there is also a defence on the ground that the second marriage was contracted in the *bonâ fide* belief in the death of the other party. It was decided in the case of *R.* v. *Tolson* (L.R. 23 Q.B.D. 168), that it is a good defence to an indictment for bigamy to prove that the prisoner, even though the seven years have not elapsed before the second marriage, at the time of the second marriage, in good faith and on reasonable grounds, believed his first wife to be dead.

363. We recommend that, where a party to a marriage reasonably supposes the other party to the marriage to be dead, but the fact cannot be definitely ascertained, the first-named party shall be entitled to apply to the court, and the judge may, if satisfied that there is reasonable ground for declaring that the second party is dead, make an order so declaring, upon which order the first-named party shall be entitled to contract a valid second marriage, but similar provisions to those aforesaid, as to an order nisi followed by an order absolute, and as to discharging the order, should be made.

364. We further recommend that, in cases of the disappearance of a party to a marriage, the court should have power, on the application of the other party, and upon notice to such person or persons, if any, as the court may think fit, to make any order for the maintenance of such other party and the children of the marriage, or either of them, which may enable the applicant to obtain assistance from any funds of the absentee which may be available, and power to vary or rescind such order.

Chapter III.

Procedure and Practice.

Defences.

365. (1) *Defences in Divorce Cases.*—The defences to a suit for divorce are either absolute or discretionary.

Absolute defences are specified in the Act of 1857 as follows:—

(i) Denial of facts alleged in the petition.
(ii) Connivance.
(iii) Condonation.
(iv) Collusion.

Discretionary defences are provided for by the 31st section of the Act as follows :—

(i) Adultery of the petitioner.
(ii) Unreasonable delay in presenting, or prosecuting, the petition.
(iii) Cruelty to the other party to the marriage.
(iv) Desertion or wilful separation from the other party to the marriage, before the alleged adultery, without excuse.
(v) Wilful neglect or misconduct, which has conduced to the adultery complained of.

366. No suggestions have been made to us with regard to any change of the absolute defences, except one of a minor character which will be referred to later (p. 136).

367. With regard to discretionary defences, except adultery, the court exercises a discretion, according to the circumstances of the case; and it has regard to its powers, under section 32 of the Act of 1857, to suspend a decree until some provision is made for a wife divorced. We think these defences should remain.

368. But with regard to a defence on the ground of adultery, although the terms of the Act leave it to the discretion of the court to grant a decree, notwithstanding the petitioner's adultery, and although, if we may judge from the debates in 1857, it seems to have been contemplated that the discretion would be exercised in accordance with the circumstances of each case, the judges of the Divorce Court, shortly after its institution, held that the discretion should not be exercised, unless the case fell within some definite category of cases capable of distinct statement and recognition. These became practically limited to the following :—

(*a*) Where the adultery is committed in ignorance of fact—as where the other party is believed to be dead,
(*b*) or in ignorance of law, as where the party *bonâ fide* believed that the decree nisi dissolved the marriage.
(*c*) Where the adultery is committed in consequence of the violence and threats of the husband.

Unsuccessful attempts have been made to include other cases (*see* Rayden *op. cit.*, p. 92; Browne & Powles, on "Law and Practice in Divorce and Matrimonial Causes," (7th Edition; 1905), p. 45). The latter work seems to consider condoned adultery should not be a bar (p. 46), but the cases appear to be against this view.

In later times, the court has felt itself fettered by the earlier decisions, which probably resulted from anxiety as to the mode of exercising a new jurisdiction, and in face of those decisions, has been unable to pronounce a decree in cases in which, in the best interests of the parties, their children, and the State, it might have been desirable to do so.

The result is that the adultery of the petitioner, even though long past and condoned, is, generally speaking, a bar to divorce.

369. In some other systems of jurisprudence, *e.g.*, those of France and Scotland, it has been considered that where both parties have been guilty of adultery and their joint married life has become impossible, it is useless to continue the tie, and that in their best interests, and in that of their children, and of morality, it is desirable to permit of divorce; in effect, that the guilt of both is a greater reason for sundering the tie than the guilt of one. We would refer to the evidence of Dr. Lushington in the notes of 1844 (Q. 35–39), and to that of Lord Salvesen (6431), who states that, according to the law of Scotland, the petitioner's guilt is no bar to a suit for divorce on the ground of adultery.

370. The point thus raised has been dealt with in the evidence under the head of recrimination. The respondent by a cross-charge is able to meet the petitioner's charge, and the King's Proctor, if such cross-charge is not made, or made and not properly pressed, can and does make it in cases where he ascertains the guilt of the petitioner. His action is naturally guided by the decisions above referred to, which leave little discretion to the judge.

The views of Lord Desart on this matter are to be found in Questions 15,867–15,875. In the course of his answers he stated: "I have found a great deal of difficulty in "forming on opinion [as to recrimination], because as King's Proctor I have felt over "and over again, at any rate in a considerable number of cases, that my intervention "has done more harm than good."

371. The question then is whether such recrimination should be abolished altogether, and the law of England assimilated in this matter to the systems of law above mentioned.

372. Two views have to be considered: on the one hand, that it is contrary to good sense to maintain the tie when both parties are guilty, when there is no prospect of reuniting them or of breaking their irregular connections and when it would be of advantage to them, their children and the State, if they were freed; on the other hand, that it is contrary to the general principles of English law to permit a petitioner to sue unless he or she does so with clean hands, and that if he or she can obtain redress for the respondent's conduct, although guilty of the like conduct, then an important check upon immorality is withdrawn.

We do not think it possible to ignore either of these considerations. We think the proper conclusion is that, while misconduct on the part of a petitioner should not be an absolute bar to relief, it is undesirable, in the best interests of the community, that a petitioner should be able to rely on his or her suit being successful against the respondent, without any consideration of what his or her own conduct has been. The object of the Legislature should be to discourage immorality. It does not fulfil this object, where it places no difficulty in the way of a petitioner, who has been guilty of immorality, being entitled to sue on account of the immorality of the other spouse.

It is to be observed that petitioners who, under the present state of the decisions, feel that there is no reasonable chance of a discretion being exercised in their favour, are led to conceal their own conduct far more than they would if they felt that the case would be considered on such merits as it possesses, and the result is a very unsatisfactory state of things which is often confused with collusion. (*See* the evidence of Lord Mersey; 601–3.)

373. The position seems to be met by retaining adultery as a defence, but permitting the court to exercise its discretion, according to the circumstances of the case, and also by considering the petitioner's conduct, when it deals with the property and monies of the parties, under its powers to provide for payments, to vary settlements, and to deal with property. A check is thus provided; for no one could then act in the belief that his or her adultery was of no consequence, and yet those cases in which it would be for the best interests of the parties, their children, and the State, for a divorce to take place could be dealt with by a decree. In other words, the excessive restriction placed by decisions upon the power of the court would be removed, and what may be considered the true reading of the Statute restored. (*See* particularly the evidence of Lord Desart; 15,867–74.)

374.—(2) *Defences in Judicial Separation Cases.*—The defences in these cases are the following:—

(i) Denial of facts.
(ii) Connivance.
(iii) Condonation.
(iv) Collusion.
(v) Adultery (unless, perhaps, condoned).

Cruelty and desertion are not bars to a suit for judicial separation on the ground of adultery (*sed secus* if the ground be a less offence), unless it seems such conduct conduced to adultery.

The defences should be upon a similar footing to those in divorce. The first four defences should remain absolute, the rest, including cruelty and desertion, should be discretionary.

375.—(3) *The Defence of Condonation.*—This is the blotting out of an offence, with knowledge of the facts, not by mere forgiveness, but by such conduct as amounts to a resumption of the married life. It is a complete answer to a charge, but if a subsequent marital offence is committed, it is held that the condoned offence is revived, the condonation being treated as conditional upon proper future conduct. It was suggested by Sir Edward Clarke, K.C., that there should, in no case, be a revival of a condoned offence.

If grounds of divorce such as we recommend are adopted, the point does not become of much importance, because these questions arise, chiefly in cases of suits by women, where two offences have to be proved to found a suit, *e.g.*, cruelty and adultery in a wife's suit. If one offence has been condoned, and another of a

different kind is committed, the present rule permits of both being proved, but this will be unnecessary, if the one is sufficient foundation for the suit.

Moreover, in cases of cruelty, condonation of first acts is natural, and, if all proof of these acts be shut out, a culminating act of cruelty might not by itself be sufficient proof of cruelty. It might be productive of hardship in cases of cruelty, if the doctrine of revival were departed from.

We think that there is not sufficient ground for making any change in respect of this doctrine.

Suits for Restitution of Conjugal Rights, &c.

376. In former days, these were a reality, and an order for restitution was enforced by attachment. But, in 1884, the Matrimonial Causes Act of that year, (47 & 48 Vict. c. 68), made provision for periodical payments in lieu of attachment, for settlement of the wife's property in case of refusal to cohabit, for non-compliance with an order for restitution being deemed desertion for two years, and for custody of children.

The provisions of this Act are chiefly put in force by women, whose husbands have been guilty of adultery, but have not committed any other matrimonial offence which, with adultery, has created a ground of dissolution. It is used to obtain a decree, the failure to comply with which amounts to a finding of desertion without reasonable cause for two years, although that period has not elapsed. This, coupled with adultery, is then used against a husband to obtain a decree of divorce, or to obtain, either against husband or wife, a decree of judicial separation.

This procedure is little used by the poor on account of the cost, but frequently by those who are well off, and it has become an understood means of enabling a woman to obtain a divorce on account of her husband's adultery alone. It has become common form for the letter of demand of return, which precedes the suit, to be ignored or rejected by the husband, so that the divorce suit may easily be reached. The effect of the evidence of the late Sir George Lewis is to show that there is in these cases, in a sense, collusion (1444–52). The proceeding, as preliminary to a divorce suit, is often a sham, and will be unnecessary, if women are placed on the same footing as men.

377. We think, therefore, that section 5 of the Act should be amended by omitting so much as gives immediate rights to proceed for judicial separation or divorce. The Act is seldom used with the *bonâ fide* object of effecting a return to cohabitation, though cases of this character are not unknown. If the other provisions of the Act effect a return, the Act is useful. If they do not, it is useful for the powers as to payment, settlements, and custody of children. Therefore, we do not recommend any alterations in the other sections.

378. Some simple machinery will be required to enable the High Court to order maintenance, &c., in cases of wilful desertion without reasonable cause, or of neglect to maintain.

Although, among the poorer classes, a woman may at once obtain an order for maintenance on the ground of desertion or neglect to maintain, in cases of those in better circumstances and who require more than 2*l*. a week (the maximum allowance which the magistrates can give), there is no machinery, except that provided by the said Act, for obtaining maintenance. We think that a woman deserted, although she ought not to be allowed to obtain a permanent order for judicial separation or a divorce until the lapse of a certain time, or a woman whose husband neglects to maintain her, might be entitled to apply to the court, after commencing a suit for the purpose, to make orders similar to those which it could make on failure to comply with an order for restitution of conjugal rights, such orders to last so long as the desertion or neglect to maintain continued, or until further order, or, in the former case, until a judicial separation or divorce be obtained.

The court should have power to refuse the application, if grounds were clearly shown, which would disentitle the applicant to relief.

If the desertion continued so long as to justify an application for judicial separation or divorce, the suit might then proceed for that purpose, and the proceedings should be no bar to the running of the necessary period of desertion.

379. We have already suggested that separation orders should not be made by a court of summary jurisdiction in cases of desertion or neglect to maintain where the object is maintenance and custody, and orders so made would not be a bar to desertion running on.

In order to make this matter clear, as there have been several decisions on the subject, we recommend that it should be specified in any Act which is passed, that desertion, for which an order, not for separation but for maintenance custody and costs has been made by the High Court or a court of summary jurisdiction, should run on, either for the purpose of obtaining a permanent order or for divorce, notwithstanding the fact that the order has been made.

Reconciliation Powers of the Court.

380. Certain evidence was given on the question whether or not the parties should be required in all cases to attend before the judge, in order that he might attempt a reconciliation. Provisions of this character are to be found in some foreign codes, and it is stated that in Germany beneficial results are found in a large number of cases.

For parties in the class of life of those who appear before courts of summary jurisdiction in the cases dealt with by those tribunals, opportunity is afforded at the hearing of the summons (which could not be practically used before that time) for attempts at reconciliation which may prove successful; but in cases which come before the High Court, the better opinion seems to be that special powers of this character would be of little or no use (*see* the evidence of the late Sir G. Lewis, 1750–3); as a rule, parties to suits in the High Court have had legal advice and have carefully considered their position, and it is unlikely that judicial intervention would be useful.

We do not think that it is advisable to make any recommendation that there should be a rule as to the parties coming before the judge with a view to reconciliation. In many cases, where the respondent has deserted the petitioner or left the country, it would be impossible. At the same time, we see no objection to giving power to the Court, in its discretion, to summon the parties before it, and to see them privately. Facts may be disclosed in interlocutory applications, or otherwise, which, in some cases, might make it useful if the judge were to have the parties in person before him.

Evidence.

381.—(1) *Cross-examination.*—Formerly the parties to a matrimonial suit were not competent witnesses as to adultery, cruelty, desertion, or any other matrimonial offence. These disabilities have been removed, but it will be seen that there is still a material limitation of the right to interrogate them.

382. By section 43 of the Matrimonial Causes Act, 1857, it was provided that—

> "The court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition, but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery."

In the Matrimonial Causes Act, 1859, the Legislature went a step further, and section 6 of that Act provides that—

> "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery, coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion."

Finally, all restrictions on the competence of parties to give their evidence on oath in matrimonial causes were removed, and by virtue of section 3 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68)—

> "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question

tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

383. The practical effect of these provisions is that no party nor witness, in a suit for divorce on the ground of adultery, is at present liable to be asked, or bound to answer, any question tending to show that he or she is guilty of adultery. This limitation seems to be a survival of ancient rules of evidence, intended to prevent a party from incriminating himself, although adultery is not a crime, and its effect as an ecclesiastical offence may be now-a-days disregarded (*see Redfern* v. *Redfern*, L.R. [1891], P. 139), and it does not appear to apply to all cases.

384. Further, no discovery or interrogatories to prove adultery can, in consequence of the aforesaid provision, be had or put in interlocutory proceedings, (*ib.*). The result is that, however guilty the petitioner may be, and however much the judge may suspect his or her guilt, so long as he or she confines his or her evidence to the case against the respondent, no questions can be put to the petitioner as to guilt on his or her side, and all that the court can do is to direct the King's Proctor's attention to the case. Moreover, if a respondent does not choose to appear, and the co-respondent does and fights the case, he is in a difficulty about compelling the respondent to give evidence; so also is a respondent, if a co-respondent will not contest a case. (*See* 10,293.) These restrictions should in the interests of justice be done away with. (*See* especially the evidence of the Lord Chief Justice of England, 15,731, Lord Desart, 15,779, Mr. Justice Bargrave Deane, 1063–4, and Lord Mersey, 1358–60).

385. We recommend that the proviso in section 43 of the Act of 1857, and also that in section 3 of the Evidence Further Amendment Act, 1869, (32 & 33 Vict. c. 68), should be repealed.

386. It will be noticed that one effect of the repeal would be to open the way for interrogatories and discovery of documents to prove adultery. We think, however, that interrogatories for this purpose should not be permitted. We fear that they would lead to great expense and possible abuse. Discovery of documents for the said purpose should be allowed by order of the court, if it thinks such discovery should be made. These points should be dealt with by Rules of Court.

387.—(2) *Magistrate's Order.*—The order of a court of summary jurisdiction should be *primâ facie* evidence of facts found therein, but the court should be at liberty to decline to act on it without further evidence.

Decree Absolute.

388. At present it is entirely within the power of the petitioner to apply for decree absolute, or to withhold the application, and the respondent cannot apply, and can only make application to the court to dismiss the petition, unless the petitioner proceed to make the decree absolute. This is a power which is open to abuse, and it seems desirable that the court should have power to make the decree absolute, on the application of either party, at the expiration of the proper time from the pronouncing thereof (unless there be an intervention in the meantime), and that proper notice to this effect should appear in the decree nisi. The power now vested in the court to fix a shorter time should be retained.

389. Suggestions have been made that the decree nisi should not be made absolute for a year, the present limit being six months, or at the discretion of the court less, but not less than three months. If cases were concerned only with people who were well off, there might be some advantage in lengthening the period, but as most cases are those of persons who have small means and may be compelled to make fresh arrangements, without delay, as to children and otherwise, we do not think that the suggestions have sufficient weight to make any change in this respect necessary.

390. With regard to the validity of a decree absolute, questions as to the validity of a decree have been raised long after it has been pronounced, mainly on the ground that the court had no jurisdiction to pronounce it, which is a valid objection, no matter how long after the making of the decree it is taken. This may be productive

of great hardship to innocent parties, as, for instance, where a divorced person has married again, and the latter marriage is held invalid for want of jurisdiction in the court to pronounce the decree dissolving the former marriage.

We recommend that a decree absolute should be unimpeachable, after the expiration of five years from the time when it was made. It would not be practicable to make this provision apply only where innocent third parties are concerned and not to the two parties themselves, for the validity of a second marriage necessarily must involve the validity of the dissolution of the first, which could not well be held still binding on the parties towards each other, but not binding towards anyone else. It may be said that the addition of this recommendation might encourage persons, who were not domiciled in England, to apply to the court, but we think the five years' interval would be sufficient check and that the danger is outweighed by the advantage of securing the position of persons, who have married divorced persons without being aware of any invalidity in the decree, and the position of their children.

Divorce Decree in Separation Cases.

391. In certain cases, the petitioner has good grounds for divorce, but chooses, sometimes from conscientious objections to divorce, sometimes from a desire to punish the respondent, to apply for separation, instead of divorce. Those who contend that a decree of separation is a greater punishment than a divorce decree in most cases are right. Moreover, we have already expressed an opinion that separation is an undesirable remedy. When parties are permanently separated, divorce is the more suitable remedy, and judicial separation might be abolished, but we have had it pointed out that it will have to be retained to meet the views of Roman Catholics and others. The late Sir George Lewis spoke strongly (1495–98) in favour of the view that the respondent should be entitled, when a decree of separation is asked for on grounds which would found a decree of divorce, to require the decree to be of the latter character. Lord Salvesen (6360–5), Lord Desart (15,858–9), Mr. Barnard (4422), and Mr. Priestley (4565) took an opposite view, leaving the option with the petitioner.

But if separation is an undesirable remedy, and leads to immorality, and is a heavier punishment than divorce, it seems unreasonable that the judge should have no power to make a divorce decree. If a party sues, where there is ground for divorce, the remedy claimed is not one which concerns that party alone, but also the parties, the children, the State and the interests of morality, and should not be left to the caprice of the one party.

392. We recommend that the court should have power, in its discretion, when a decree of separation is asked for on grounds found by the court which would justify a decree of divorce, to make a decree of divorce on the application of the respondent.

Damages.

393. A claim for damages may be made by a husband against a person who has committed adultery with the petitioner's wife. This is provided for by section 33 of the Act of 1857, which was passed in substitution for the old law as to actions of *crim. con.* By some, the principle of an action for damages for the loss of a wife is objected to, and foreigners cannot understand how the English law allows it. It seems to have been founded on notions of property. By others, it is justified as a means of punishment, though the damages are assessed on the basis of compensation for injury done, and not on punitive grounds.

The damages, when recovered, are placed in the power of the court, which can order part to go to the husband for extra costs and expenses, part to children, part even for maintaining the wife to prevent her being driven into immoral courses, and the remainder is usually given to the husband. The damages are awarded by a jury, and being regarded as compensation and not as punitive, an inquiry at the trial into the co-respondent's means is not admissible (unless, perhaps, the means have been used to procure the seduction of the wife). This course, however, is contrary to the sense of the jury, who invariably ask what are the means of the co-respondent, and have to be told that they are not relevant.

394. We think it would be a great advantage if another system were introduced, by which the co-respondent should be dealt with by the court, in the same way as a

guilty husband is dealt with at present. The latter can be compelled to provide for his wife, and to secure money for that purpose, and to provide for his children. On the other hand, at present the co-respondent cannot be compelled to do anything for the woman he has seduced, except by the award of some portion of the damages for her benefit: he may cast her off entirely.

395. We recommend that the court should have power to order the co-respondent to pay any actual pecuniary losses sustained by the petitioner, and to settle property, or make other financial provision or payments to or for the benefit of the parties, or either of them, or the children, as ordered, in lieu of payment of damages. If this power be given, there should be added power to require security. Provisions of a similar character should be made as against a woman found guilty with a respondent husband, with power to make her a party to the proceedings by service, and to override provisions against anticipation.

Punishment.

396. Some witnesses were in favour of punishing parties guilty of adultery, by which we understand making adultery a criminal offence (*see* as an instance 14,416). We do not think that the consideration of this suggestion falls within the terms of our Commission.

Jury.

397. A serious question is raised as to whether trials of divorce cases should be before a judge, or a judge and jury. Separation cases are heard before a judge, and he may order the trial thereof by jury, but in divorce cases any party has a right to a jury.

398. Section 28 of the Act of 1857 provides that "the parties or either of them" [*i.e.*, to a divorce case] "may insist on having the contested matters of fact tried "by a jury as hereinafter mentioned." By section 33 of the said Act, damages recovered against an adulterer are to be ascertained by the verdict of a jury, although the respondents or either of them may not appear. Section 36 is as follows:—"In "questions of fact arising in proceedings under this Act it shall be lawful for, but, "except as hereinbefore provided, not obligatory upon, the court to direct the truth "thereof to be determined before itself, or before any one or more of the judges of "the said court, by the verdict of a special or common jury." By section 40, "the "court may direct issues to try any fact before a judge of assize, or at the sittings "for the trial of causes in London, or Middlesex, either by a special or common jury." The powers conferred by this section are not used in fact.

399. Juries were not used in the ecclesiastical courts, nor are they in Scotland, nor in most other countries, in divorce cases. Trial by jury is less favoured and less used than it was in civil cases in the High Court, and in the county courts is not largely used. Divorce cases are tried more expeditiously, more economically, and more effectively before an experienced judge than before an inexperienced jury, whose sympathies are easily excited, who know little of any class of life except their own, and who may take extravagant views, say, of cruelty.

400. It is natural that advocates of note should lean to a jury, and it is not unreasonable to suppose that a jury is likely to be asked for when the party wishing for it has a bad case. If it be said that, to provide that all divorce and matrimonial cases should be heard by a judge alone, is to leave too much to the judge, it should be remembered that there would be an appeal both on law and fact. All the undefended cases are taken by the judge alone, except those in which damages have to be assessed, and these would be removed from juries, if the suggestion above as to damages be adopted.

401. The following table shows the mode in which suits for divorces were disposed of in the years 1908, 1909, and 1910:—

	1908.	1909.	1910.
Total number of cases heard - - -	716	722	627
Before a judge without a jury - -	643	641	567
„ special jury - - - -	18	17	13
„ common jury - - - -	55	64	47
Defended - - - - -	162	135	127
Undefended - - - - -	554	587	500

402. The comparative reduction in the cost and length of trial before a judge without a jury is a matter of extreme importance in any case, but more particularly in this class of case where the husband usually has to provide the costs of both himself and his wife. Further, if juries are retained, they will have to be provided for the local courts.

403. The witnesses, who referred to this subject, differ in opinion, but we think the weight of the evidence is in favour of trial by a judge alone.

Mr. W. English Harrison, K.C., the chairman of and representing the Bar Council, would leave parties entitled to a jury, (Vol. I., pp. 464, 468), but Mr. Winterbotham, President of the Law Society for 1910, expressing the views of his Council (11,754), was in favour of trial by judge alone, and the evidence of Mr. G. A. Solly, the Vice-President of the Liverpool Law Society (10,634), was that his committee took that view. Mr. Justice Bargrave Deane considered that in the Divorce Court greater justice was done by a judge than by a jury (1054) and Lord Mersey's views were to the same effect (1276). The Lord Chief Justice was himself in favour of trial by judge in these cases, but would leave the right to a jury as it is (15,734–9).

404. We recommend that trials in divorce and matrimonial causes should be before a judge alone.

405. If it should be determined not to follow this recommendation, we are clearly of opinion that the judge should in all cases have a discretionary power as to whether or not there should be a jury. This is the position in probate cases (except when the heir-at-law is entitled to a jury) which are often of great importance (*see* 20 & 21 Vict. c. 77. s. 35), and, moreover, this power would prevent abuse when the application for a jury is made for purposes of delay, or to place a husband in difficulties with regard to extra expense, or when, for any other reason, the judge did not consider that the application was reasonable.

Costs.

406.—(1) *Party and Party Costs.*—Taxation of costs is "as between party and party," as understood in the ecclesiastical rather than in common law courts, but it does not seem clear that such taxation gives the successful party what he is entitled to, namely, all the costs necessary for proceeding, and taxation should, in our opinion, give the latter result. If it does not, a husband, who usually has to provide for his wife's costs as well as his own, is liable to be sued at law for extra costs, which are necessary for the wife's proceedings.

407.—(2) *Wife's Costs.*—The fact that, in general, a woman is dependent upon her husband, and that he is liable for her necessaries leads to her being entitled, by the rules of the court, to have her costs of suit, whether petitioner or respondent, provided for by him. (*See* Rules 158 and 159.)

Even if women are placed upon an equality with men, as regards grounds of divorce, the inequality of means will remain, and the rule will have to remain.

But it may be liable to abuse, and should be carefully applied. Before its application, the court should be satisfied that the provision for the wife is necessary, because she has no separate estate or income, or other means of providing for her costs, and that she has reasonable grounds of suit or defence. Her application, unsupported as to these matters, should not be accepted, and satisfactory confirmatory proof should be required. We understand that this is the practice, but it would seem

desirable in framing new rules to provide specifically with regard to this matter, so that a wife should not have provision made by her husband for her costs unless it is clearly shown that she has not adequate means for proceeding or defending, as the case may be, and has reasonable grounds for suit or defence. If a wife is sued by her husband *in formâ pauperis*, she should not be provided for on a different footing, nor, if he has to defend as a pauper, should she, if suing, get more than a pauper footing: she might, if necessary, be put on the poor's roll as hereinafter proposed.

If a husband is too poor to provide for his wife's ordinary costs as well as his own, he might be permitted to provide her costs, as if she were proceeding *in formâ pauperis*, which she should be allowed to do. The hardship on poor men of having to provide two sets of costs is great, especially when the wife's case has no real foundation.

In any suit by a wife for divorce or judicial separation or restitution of conjugal rights, if the respondent offer to execute a deed of separation to the satisfaction of the court, and the offer be refused and the petitioner fail in the charges made, the court should, in dealing with the costs, be at liberty to deprive the petitioner of costs or order her to pay them.

These points should be dealt with by Rules.

408.—(3) *Fees and Costs generally.*—If local sittings are to take place, the subject of fees and costs will require to be considered, and opportunity should be taken to revise the present scales in the High Court. It has been pointed out to us that the scales are in various respects too high.

Proceedings in formâ pauperis.

409. By section 54 of the Act of 1857 the "Court may make such rules and "regulations as it may deem necessary and expedient for enabling persons to sue in "the said Court *in formâ pauperis.*"

The rules made under this power are Rules 25–27 and 208–11 of the Divorce Rules.

410. We have already (p. 45) stated the nature of the practice under these rules, shown how few cases have been brought under them, that only about 15 per annum have been heard, that the procedure does not meet the needs of the poor, and the objections to it. We may add that, for the 25 years, from 1883 to 1907, there were filed 15,505 petitions for dissolution, 2,626 petitions for judicial separation, and only 812 petitions for leave to sue or defend *in formâ pauperis* (Mr. R. T. Gates, 5174–7).

411. Even if the practice were amended by the assignment of counsel and solicitor and otherwise, so long as the prosecution and hearing of cases is confined to the High Court in London, the difficulties, which we have already mentioned, arising from the expense and inconvenience of conducting cases at a distance through agents who require to be paid (Mr. T. P. Griffithes, 3409–11), of taking parties, witnesses, and solicitors to London, and maintaining them there, and of breaking away from work or duties for that purpose, would not be removed.

412. If our recommendations as to local sittings of the High Court and procedure therein be adopted, the difficulties would be largely removed, and the cost and inconvenience of proceeding in the cases contemplated would be materially diminished, and many who are now debarred by cost and inconvenience from taking proceedings, would be enabled to assert their rights.

413. Even, however, with these facilities, there will remain a considerable number of persons, who will not be able to take advantage of them, unless some efficient and simple method of proceeding *in formâ pauperis* be adopted, and it is necessary to consider what that method should be.

414. In Germany, as we have already noticed (p. 27), a poor litigant not only has easy access to district courts, but is not compelled to pay court or lawyers' fees, and can obtain the free services of a lawyer on his or her behalf; and even the expenses

of witnesses are provided out of public moneys. Every lawyer, who has a practice in the court, is obliged to perform this duty (Dr. Neuhaus, Vol. III., p. 473–4). The costs and expenses of a successful poor party may be recovered from the defendant, if he has the means. The position is thus summarised in the evidence of Dr. Neuhaus (42,838): "That system is a complete one for enabling the poorest person to enforce " his claim for practically nothing, and, if he succeeds against a person who has " money, that person has to pay the expenses?—Quite so."

The provisions for "assistance judiciaire" in France, where every Tribunal d'arrondissement has jurisdiction, are given at length by Monsieur Mesnil (Vol. III., p. 480 *et seq.*). An avocat, an avoué, and a huissier are appointed to assist the poor party, and are bound to give their services.

For The Netherlands, where there are 23 local courts, the practice is stated by Dr. Bisschop (Vol. III., p. 507–8). A poor person, who is incapable of paying for legal proceedings and has *primâ facie* a good case, is able to proceed without legal fees or expenses, except the expenses of witnesses. Legal practitioners (the professions of advocate and solicitor are combined in The Netherlands) promise, on being called or admitted, to give their services gratuitously in any cases in which the President of the court asks for such services.

415. Lord Salvesen (Vol. I., p. 255 *et seq.*) explained the Poor's Roll system in Scotland, and Mr. J. B. Lorimer, who represents the Writers to the Signet Society on the Board of Reporters on *probabilis causa litigandi* of applicants for the benefit of the Poor's Roll, and acts as clerk and secretary to the Board, put in a memorandum prepared by him on the subject, which will be found in Vol. I., pp. 278–82.

The system, so Mr. Lorimer states (*ib.* p. 278), rests on an ancient Statute of the Scots Parliament, namely, an Act of 1424, c. 45, and its cardinal features appear to be as follows:—

A litigant who is desirous of obtaining the benefits of admission to the Poor's Roll, viz., of exemption from fees and charges and of having counsel and agent (solicitor) assigned to him or her, obtains assistance from one of the Poor's Agents, who are to be found in every considerable town in Scotland, in preparing and presenting his or her application. He or she has to obtain a certificate in statutory form as to means and other matters, the facts in which are certified by the minister and elders of his or her parish, stating either that the truth of the facts alleged is within their personal knowledge, or that it depends entirely on the statement of the applicant, and the litigant through his agent has to prepare the written precognitions or statements of the witnesses, and the documents, if any, necessary to show a *probabilis causa.*

A petition is then presented to the President of one of the Divisions (that is, the Courts of Appeal) of the Court of Session, who remits the whole process to a Board, called the Board of Reporters on *probabilis causa litigandi*, composed of two counsel, appointed by the Faculty of Advocates, one Writer to the Signet, and one Solicitor to the Supreme Courts, appointed by the Societies of Writers to the Signet and Solicitors to the Supreme Courts respectively, to report whether there is a *probabilis causa*, and sometimes also whether there is a sufficient degree of poverty.

The Reporters in due course, on the above or further materials, report whether there is or is not a *probabilis causa*, as to which their decision, unless the Court thinks there has been a gross miscarriage of justice, is final, and they also, if the matter be referred to them, report on the question of the applicant's poverty, their decision on this being open to review by the court on the facts ascertained by them. If the result be in the applicant's favour, the agent applies to the court for his client's admission to the Poor's Roll. The court grants this, unless cause is shown to the contrary by the other party, and appoints one, from six counsel nominated annually by the Faculty of Advocates (commonly called Poor's Counsel), and an agent, from four Writers to the Signet and four Solicitors to the Supreme Courts nominated annually by their respective societies to act as solicitors in the conduct of Poor's cases (commonly called Poor's Agents), to conduct the case, which thenceforward proceeds in the usual way.

The counsel and agents act gratuitously. The cost to the litigant is the actual out-of-pocket expenses of the agent, of citation by the messenger-at-arms, postages, and the travelling expenses and fees of witnesses who have to attend the hearing. In the event of the suit being successful, costs and expenses are recoverable from the unsuccessful party as in an ordinary suit.

Civil cases in the Court of Session are heard in Edinburgh, and the system aforesaid applies to all such cases. The sheriffs' courts, which have a considerable jurisdiction in ordinary civil cases, have no jurisdiction in divorce cases, though, under a recent Act, they may deal with separation and aliment cases.

In a small number of cases, difficulties arising from the cost and inconvenience of proceeding to Edinburgh exist, but they appear to be little felt in Scotland, where the bulk of the population is within easy reach of that city, compared with the corresponding difficulties in England and Wales, where large populations exist at considerable distances from London. (*See* the evidence of Lord Salvesen, Vol. I., p. 251-2.)

416. For proceedings *in formâ pauperis*, two conditions should be complied with: first, the applicant should have a proper *primâ facie* case; second, his or her means should be insufficient for the purpose of proceeding in the ordinary way.

We think that a system should be adopted for the proposed district courts which will secure that the formalities necessary, in order that these conditions may be complied with, shall be both simple and effective. The cases which will come before those courts do not need a system so elaborate as those systems which deal with all sorts of civil cases in which questions as to probable cause may involve some difficulties. Cases of the class with which we are dealing are as a rule simple, and, with rare exceptions, depend on pure questions of fact. The charges made are easy to state, and it can be seen at a glance whether an offence is alleged for which relief is obtainable, and whether an answer contains one or more of the few available defences. We think that the method, which we hereafter suggest, is sufficient for the purpose of ascertaining compliance with the first condition.

With regard to the second condition, we have already given (p. 45) the figures as to means at present required by the practice of the divorce court, viz., income not exceeding 30*s.* or 32*s.* per week, and assets not above 25*l.* and clothing. The limit of income thus stated is not a hard and fast limit, but leave is not usually given if it be exceeded. We think that a lesser income may possibly be the general limit in cases in the local courts, for we anticipate that our proposals will greatly lessen the cost of proceedings. The principle to be acted on is that the ascertained means are insufficient for proceeding in the ordinary way. The proper minimum and the best way to ascertain it will not be difficult to determine, when the system is tested. Rules will, no doubt, leave some discretion to the court, as they do now.

417. We do not propose to set out here the precise rules for obtaining leave to proceed, or defend, which will be matter for the authority which frames those rules, but outline the proposals, which we think should be carried into effect by rules.

1. The application should be made to and dealt with by the registrar of the court, with liberty to refer to the judge. It should not be necessary to serve notice of the application on the opposite party or parties, for we think that it would be sufficient, having regard to the fact that most of these cases will be undefended, to leave such party or parties to apply to de-pauperise the applicant.

2. It should be supported by lodging the claim, accompanied by the affidavits of truth already mentioned, and these should also (i) state the names and addresses of the witnesses, and exhibit their proofs; (ii) state the position, occupation, income, earnings, and means of the applicant (and if the applicant be a wife, those of her husband also) and the children, or others, if any, dependent on the parties; (iii) exhibit a certificate containing the particulars mentioned in the next sub-paragraph.

3. A certificate exhibited as aforesaid should be lodged. The certificate should be signed by some person of position, as, for instance, a magistrate or justice of the peace, or minister of religion in charge of a church in the district in which the applicant resides, or the clerk to the board of guardians or "officer of the court" as above defined (p. 75) for the said district, as to the position, circumstances, and means of the applicant, and length of residence, &c., and whether the applicant is of deserving character. (*See* the form used in Scotland, Vol. I., p. 279.)

4. The rules should proceed on similar principles as to cases of leave to defend. There is a difference where there is a mere denial, and where there are cross charges, though, even in the former class of case, the affidavits should swear to a *bonâ fide* defence.

5. On leave being granted, all court fees should be remitted, and manuscript or typewritten pleadings and other papers required to be filed should be permitted.

6. A counsel or a solicitor or both may, if necessary, be assigned by the court to assist the litigant if he so desires it, and the counsel or solicitor so assigned should not be at liberty to refuse his assistance, unless he satisfies the judge that he has some good reason for refusing. No fees should be payable by the pauper to the counsel or solicitor (compare the Rules of the Supreme Court, Order XVI., rules 25–28).

7. To facilitate the provisions as to assignment of counsel and solicitor, the registrar of each court should keep a list of those counsel and solicitors, who propose to practice in the court at which the case is to be heard, who would be willing to act in such cases, from which, so far as possible, a counsel and a solicitor for each case should be selected in rotation. The list of solicitors should be prepared annually by the local law society, if any, and approved by the Incorporated Law Society, or prepared by the latter Society, where there is no local society.

8. Mr. Lorimer in his evidence as to the Scottish Poor's Roll states (Vol. I., p. 281): "In practice many litigants on the Poor's Roll are quite willing to make "contributions towards the expenses of their action beyond the actual cash outlays." We think the same course should be permitted here. If the suit be successful, the ordinary costs and expenses, including costs of counsel and solicitor, which would be allowed on taxation in such cases, should be recoverable from the unsuccessful litigant, if possible.

It may be said that this last proposal is contrary to present professional etiquette, but it is adopted elsewhere as already stated, and as neither counsel nor solicitor appointed will have advised the initiation of the case in which they are appointed, we see no reason why the course we suggest should not be adopted by the professions.

We believe that the professions would be ready to assist in the scheme which we put forward.

418. The scheme should be made applicable to those cases in which the court is asked to continue an order made by a court of summary jurisdiction, or to grant further relief to a party remaining separated by the order of such court. The order should be *primâ facie* proof of probable cause, in respect of any charge founded on it, so as to minimise the formalities required to comply with the first condition aforesaid.

419. We do not propose to apply this scheme to divorce and other matrimonial cases in the Central High Court in London generally, because our proposals are directed to relieving that court of the cases of the poor, and enabling them to sue in the local courts. But there may be cases, in which a poor respondent or co-respondent or party cited in proceedings in the High Court may need this assistance, and the court should have power to allow it in accordance with rules, and to assign counsel and solicitor from lists kept for that purpose framed in a similar manner to that above suggested. Similar provisions will be required for appeals to the Divisional Court, either from the district commissioners or courts of summary jurisdiction, if the counsel and solicitor, who had appeared in the court below, are unable to appear on appeal.

420. We do not propose any system of proceeding *in formâ pauperis* before courts of summary jurisdiction, for we have not gathered that there is sufficient need for such a system in those courts.

Parties.

421. An adulterer must be made a co-respondent unless excused on special grounds, but when the charge is against a husband the court may, if it see fit, direct that the person, with whom the husband is charged, be made a respondent (*see* Act of 1857, s. 28). It seems that it is not strictly necessary to compel a wife to make an adulteress a party, and great injustice may be done if a woman is accused, and yet may never hear of the charge. A party (either wife or co-respondent), making a charge against a man, party to the suit, with a woman, should be required to serve notice of the proceedings with a copy of the writ and statement of claim, or, if the charges are in a defence, of the defence, on such woman, unless excused by the court from so doing on special grounds. Such a notice would give the opportunity to the party served to appear, and she should be entitled to do so, if served; and even if service has been excused, any woman, charged and hearing of the charge, should be

entitled to appear and defend the charge. The provisions of section 3 of the Matrimonial Causes Act, 1907, are not wide enough.

422. We recommend that the provisions as to service, notice, and right to appear should be the same in a suit for judicial separation, where a charge of adultery is made, as in a suit for divorce, in which a similar charge is made.

Rules, &c.

423. The President of the Probate, Divorce, and Admiralty Division has at present power to make rules of practice in divorce and matrimonial cases. We think that this power should rest with the Rule Committee, of which the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President himself, and others are members.

424. We suggest that two of the Commissioners taking the local work of the High Court, in accordance with our proposals, should be added to the Rule Committee.

425. The present rules of practice in the Divorce Division are, in our opinion, in need of many amendments, but we think it would be useless for us to consider these in detail in this report. When it is determined what changes, if any, are to be made both with regard to the administration of the law and the law itself, we think it will be necessary for whatever authority is constituted for the purpose of framing rules of practice to revise, consolidate, and amend the present rules of practice, and, if cases are to be heard in different districts by the High Court sitting locally, to frame the necessary rules of practice. Suggestions for improvement in details are given by some of the witnesses, as for instance by Mr. T. Smith Curtis, partner in a London firm, having a considerable agency practice (Vol. I., p. 170), Mr. Freke Palmer (14,855), Mr. Pierron (15,155), which the authority aforesaid would no doubt consider. We think, however, our suggestions cover the principal points.

426. It would simplify matters, if the ordinary High Court procedure by writ were adopted, as it has been in Admiralty and Probate cases, which formerly were governed by different rules of practice to those of the common law courts.

Citations and petitions might be abolished, as they have been in the Admiralty and Probate courts. A writ, with a statement of claim endorsed upon it containing a statement of the facts which form the groundwork of the claim, should suffice. The facts necessary in a divorce petition are usually short and simple, and there would be no difficulty in placing them on the back of a writ.

427. The writ should not issue, without an affidavit showing that the petitioner has a good case, as is the course adopted in Admiralty and Probate cases. At present, the affidavit in support of a petition in a matrimonial case is made by the party alone, who deposes that the paragraphs of the petition, which state facts within his or her knowledge, are true, and as to paragraphs which state facts not within the personal knowledge of the deponent, that those paragraphs are true, to the best of the deponent's information and belief. In the case of cross-charges, an affidavit in a similar way verifying the statement in the answer is required. This procedure is adopted in order to prevent wholly unfounded charges; but we do not think it is sufficient; both with regard to charges in a petition, and with regard to charges in an answer, the solicitor, if any, for the party making the charges should be required to depose that he has investigated the charges, and believes them to be well founded. If, at the time of the filing of the petition or answer, there should be no solicitor on the record for the party deponent, but a solicitor be afterwards employed, he should be required then to file the affidavit suggested.

428. In all cases, whatever charges a respondent has against a petitioner should be capable of being made by cross-claim and not require a cross-suit. After service of the proceedings, the papers served should be filed, but, in cases which are brought in the local district courts of the High Court, the service would ordinarily be effected by the officers of the court and would be retained by the court. If power be given to the party to serve, then filing after service, with an affidavit of service, would be necessary.

Particulars.

429. A prolific source of expense and delay in divorce cases is the practice of making some specific charges of adultery in the petition, and concluding with a general charge of adultery between the parties. The result is applications for particulars, and the introduction of fresh charges by way of further particulars. We consider that every charge in a petition should be specific, with date, place, time, &c., sufficient to give adequate notice of the charge, and that, if any further charge be made, it should only be introduced by leave of the judge, on an application to amend. We recommend that the rules should specifically deal with this. The same observations apply to charges made in an answer, and to any charges made in any case, whether for divorce or otherwise. The costs of an application to amend should be borne by the applicant, unless the judge should otherwise order.

Registration of Decrees.

430. A register of all decrees in divorce and matrimonial cases should be kept at the Principal Registry in London, to which the registrar of the court pronouncing the decree should send the necessary details.

431. It would be a public convenience and safeguard, if these decrees were required to be registered through the Registrar of Births, Deaths, and Marriages. The registrar of the court pronouncing the decree should send the required details of the decree to the aforesaid registrar.

432. The register of marriages, in giving the status of parties, if a party has been divorced, usually mentions the fact, but does not state whether the divorce was obtained by or against such party. It would be advisable that this should be stated.

Variation of Settlements, &c. &c.

433. The 45th section of the Act of 1857 provides that, in any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.

By section 5 of the Matrimonial Causes Act of 1859, it is provided that the court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit; and by section 3 of the Matrimonial Causes Act of 1878 the court may exercise the powers vested in it by the provisions of the said section 5 of the Act of 1859, notwithstanding that there are no children of the marriage.

The following are the provisions of the Matrimonial Causes Act, 1907 :—

1.—(1) The court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable, and for that purpose may refer the matter to any one of the conveyancing counsel of the court to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the court may, if it thinks fit, suspend the pronouncing of its decree until such deed shall have been duly executed.

(2) In any such case the court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding subsection:

Provided that—

(*a*) If the husband afterwards from any cause becomes unable to make such payments it shall be lawful for the court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the order wholly or in part as the court may think fit; and

(*b*) Where the court has made any such order as is mentioned in this subsection and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.

(3) Upon any petition for dissolution or nullity of marriage the court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife as it has in a suit instituted for judicial separation.

434. It will be seen that the present power to vary settlements, under the Matrimonial Causes Act, 1859, is confined to cases of divorce and nullity decrees, but it has been felt that the power should be extended to cases of judicial separation. In these cases there is the possibility of the parties being reconciled, so that orders affecting them may come to an end, but this would merely be one of the contingencies to provide against in the variation order.

435. Again, in cases of judicial separation, it will be seen that there is at present no power to order a husband to give security for payments ordered, although there is this power in cases of divorce and nullity decrees, and in suits for restitution of conjugal rights. This power should be extended to judicial separation cases.

436. With regard to children, the court has power, under section 35 of the Act of 1857, in cases of judicial separation, nullity, and divorce, to make interim and final orders with respect to the custody, maintenance, and education of the children of the marriage, and may direct proceedings to be taken to place such children under the protection of the Court of Chancery, and, by section 4 of the Act of 1859, the court may make such orders after the final decree.

437. It is to be noticed that, in these provisions, there is no power to make an order upon a husband for security for payment ordered to be made by him for the support and education of the children, whether in divorce, nullity, or separation cases. This power should be conferred.

438. There is no power to reduce or increase security given to a wife. This power should be given, both with regard to security given for her benefit and also with regard to security given, under our previous recommendation, for the benefit of the children.

439. At present there is no power to vary deeds of settlement, which have already been varied by order, that is to say, there is no power to vary an order of this character once made, however much circumstances may change. Power to make such variations as are required from time to time should be conferred; but, to prevent unreasonable applications, leave to apply should be necessary.

440. In general the powers of the court to vary settlements, to order payments, to secure moneys, and to order settlements of property need amplification. The court should be able to deal more fully in all cases with the property settled on or belonging to the parties, or either of them, and to order payments and security for moneys ordered to be paid, so that the position of the parties and their children, which is changed by virtue of the order of the court, should be dealt with also as regards property, income, and payments, with powers to vary the orders and documents, if necessary, at a later time.

441. It does not appear clear that the court, until an order has been made, has power to enjoin the party, against whom the order is made, from disposing of his or her property, and defeating the effective operation of the order when made (*see Waterhouse* v. *Waterhouse*, L.R. [1893], P. 284). The court should have power, after proceedings

have been commenced, to make *quia timet* orders in cases where it thinks fit to do so, and should have a general power to set aside voluntary dispositions of property, made without valuable consideration in order to defeat the exercise, in proceedings which have been or are about to be instituted, of the powers aforesaid or any of them.

442. Any powers which may be exercised against a woman (as, for instance, those under section 45 of the Act of 1857), should be exercisable against a man, and any powers, which may be exercised against a man, should also be exercisable against a woman, who may be in a position to comply with orders as to property and money, and any restraints on anticipations which affect her should be removable.

443. The above sections dealing with these matters may require alteration, if the grounds of divorce are altered.

Enforcement of Orders.

444. Any orders for payment of alimony, maintenance of wife or children, or other matters which, in the opinion of the court, can be more readily enforced by the procedure under the Summary Jurisdiction Act, should be so enforceable, on lodging with the clerk of the inferior court a copy of the order of the court, certified by the High Court Registrar, which, upon such lodgment, should become an order of the magistrate or justices, as the case may be.

Appeals.

445.—(1) Appeals from courts of summary jurisdiction should be to the Divisional Court of the Probate, Divorce, and Admiralty Division, as they are at present, in cases in which those courts have jurisdiction, and the decision of the Divisional Court should be final.

446.—(2) An appeal should lie from the High Court in local jurisdiction cases, or, in applications for new trials in such cases, to the said Divisional Court whose decision should be final, except on a question of law.

The grounds on which we make this recommendation are that, although appeals from the High Court are to the Court of Appeal, in these cases of the exercise of jurisdiction locally it seems to us desirable that the appeals should, in the first instance, be concentrated in the hands of the judges of the Divisional Court, who will thus be able to administer the law in line with their own decisions.

447.—(3) Appeals and applications for new trials in cases heard in the Central High Court in London, whether before judge or judge and jury (if juries be retained), should be to the Court of Appeal, as at present, except that a change should be made in applications for new trials from a judge alone, which at present are to the Divisional Court, consisting of himself and the other judge of the division. These applications should be made to the Court of Appeal. The provisions with regard to proceedings *in formâ pauperis*, hereinbefore indicated, should be applied to cases on appeal to the Divisional Court and Court of Appeal.

448. At present the times for appeal in final and interlocutory appeals and for applications for new trials from the court in London are not clearly defined; they should be placed on the same footing as those in other cases, as should appeals to the House of Lords, except that no appeal from a decree absolute should be permitted, unless the decree nisi is appealed against, as is the case under the present law.

Collusion.

449. It is contended (*see* 3481, 3743, and 6686) that at present collusion is treated too strictly. Collusion is thus described by Mr. Rayden, at page 83 of his work before mentioned (p. 117):—

> "Collusion is not, like condonation, a well-understood term; but it is held to exist where the initiation of a suit for dissolution of marriage is procured, or its conduct provided for by agreement or 'bargain' between the spouses, or their agents, particularly an agreement not to defend, even where the agreement is disclosed to the court, and where no one is able to indicate any fact which

is being falsely dealt with or withheld; because the court cannot allow itself to be hampered in ascertaining, for itself, whether there is danger of a husband, or wife, 'obtaining a divorce contrary to the justice of the case': collusion, although an absolute bar to dissolution of marriage, does not prevent a fresh suit (free from collusion) being afterwards brought."

450. It is alleged that there is no impropriety in parties agreeing as to the course to be taken in a suit, if such agreement is honestly and properly made in a suit in which there is previously an adequate and good ground for divorce. It is said that, at present, parties and their solicitors are kept so completely at arm's length, through fear of being considered as colluding, that unnecessary delay and costs are incurred.

451. We think that the mere fact of any such agreement should not be conclusive proof of collusion, and that the court ought to have liberty, when all the facts are placed before it, to act accordingly.

Voluntary Deeds or Agreements for Separation.

452. These were formerly held invalid, in the ecclesiastical courts, as contrary to public policy, but latterly they have been regarded as binding, and may be useful in some cases, as, for instance, where both parties for religious reasons object to dissolution of marriage; but serious difficulties may arise from holding parties to such agreements, which may be much affected by change in circumstances, and the position of the parties and their children. To enforce payments may require a suit, and consequent delay. Money, which may be adequate at one time, may be inadequate at another.

Children may require to be dealt with in a manner which is necessary for their interest, but was not provided for by, or is contrary to the terms of, the deed.

The deed is a bar to a judicial separation, or separation order on the ground of desertion, and it may be a bar to a suit for restitution of conjugal rights.

453. Amendment of the law is necessary, and we suggest that the best way in which the matter can be dealt with is as follows:—

1. Proceedings to enforce payment of monies, payable under a deed or agreement of separation, can be taken in the ordinary way. We do not think it necessary to recommend further special power as to enforcing payment, except that already suggested on p. 79 for the courts of summary jurisdiction, and except that either party to such a deed or agreement should be entitled to make it a rule of the High Court, whether it contains an agreement that this may be done or not.

2. Where there is default in payment for a month or more of an instalment due under a deed or agreement providing for payment of instalments larger in the aggregate than 2*l*. per week, a process similar to that for courts of summary jurisdiction, already suggested with regard to agreements for payment of 2*l*. or less weekly, should be permitted.

The applicant to whom the money is payable should be allowed to apply to the High Court in London, or, in cases where the means of the parties are within the limits above suggested, to the local High Court, to treat the deed or agreement as at an end, and find that the husband has been guilty of desertion from the date of default, and the court should be at liberty to order and find accordingly, and to make orders for maintenance, &c., on the ground of desertion, as suggested on p. 79, unless the court should think that reasonable excuse for the default has been shown; and the respondent should have liberty to answer the application by proof that he had reasonable cause for leaving the applicant, apart from the agreement of the parties, or by any other ground of defence which would be an answer to a suit on the ground of desertion. From the date of such order, the respondent should be deemed to have been guilty of desertion, for the purpose of any future proceedings in the High Court or elsewhere.

3. In order to meet new conditions, the High Court should have power, on the application of either party, if in the opinion of the court it was reasonable in the circumstances to do so, to set aside any deed or agreement for separation, on such terms as it may think fit, or to vary its terms and impose any new terms which it could impose on or after a decree of judicial separation, with power to vary these terms as it would after such a decree under powers given in accordance with our recommendations. To prevent unreasonable applications, the application should not be made as of right but only by leave of the court.

4. If a deed or agreement of separation be set aside or determined, or a decree or order for temporary separation should come to an end and no permanent order be made, or the parties are living apart without any deed or agreement or decree or order of separation, then, on application by either party *bonâ fide* willing to resume cohabitation to the other to resume cohabitation, if the party applied to refuse or fail to resume cohabitation, such party should be deemed to be guilty of desertion, commencing from the date of the demand, unless such party has reasonable cause for such refusal or failure.

A provision of this nature seems to be required to meet decisions to the effect that, to constitute desertion, there should be a pre-existing state of cohabitation.

Consolidation of Acts.

454. An amending Act will be necessary if our proposals be adopted, and we consider it would be advisable to consolidate the present Statutes and amendments in one Act. Amendments in mere matters of practice could be dealt with by Rules of Court.

The consolidated Act should include the Statute Law relating to matrimonial matters over which courts of summary jurisdiction have powers, amended as we recommend.

Chapter IV.

Marriage of Guilty Parties.

455. Whether the law remains substantially as it is, or whether further grounds for divorce are established, the question of whether or not a party to a marriage should be permitted, as at present, to marry a third person, with whom adultery has been committed by such party, requires consideration. On the one hand, such a re-marriage gives a guilty party an opportunity of rehabilitation to a certain extent; on the other, the question is whether, in the interests of general morality, such a marriage should be permitted. It is remarkable that both in England and in Scotland this subject has been regarded from different points of view, according to whether attention was primarily directed to general principles or to the position of two particular guilty individuals.

456. In England, during the period of divorce by private Acts of Parliament, it was required, and in Irish Bills of divorce it is still required, that the Bill should contain a clause prohibiting the marriage of the two guilty parties. This clause was formerly struck out in committee in the House of Commons, but latterly in committee in the House of Lords.

457. In Scotland, by a Statute passed in 1600, (Act 29, "anent the marriage of adulterous personis") the marriage of a person, with one with whom such person is found guilty of adultery, is forbidden.

The Statute is not in practice acted upon. The decree is drawn without mentioning the name of the third person, and thus there is no prohibition of the marriage of the guilty party with any third person, and therefore there is no prohibition of a marriage with the guilty third person.

458. The subject is deserving of full consideration, especially in view of the importance attached to it by the Churches. We, therefore, propose to give a summary of the discussions which have taken place in Parliament from time to time on the subject.

A.D. 1771.—A Bill was introduced on 26th February 1771 into the House of Lords by the Duke of Athol and passed (15th March) by that House, "to prevent any Bill "from being brought into Parliament for the Dissolution of any Marriage for the "Cause of adultery, unless a Clause or particular Words be inserted, to prevent the "Person against whom the Adultery has been proved, from marrying or contracting "Matrimony with the Person with whom he or she shall be proved to have carried "on such criminal Intercourse; and to declare the Issue of such Marriage incapable "of inheriting."

We have not found any account of the debate in the House of Lords, but the proceedings in the House of Commons are reported in "Parliamentary History," vol. 17, 185, 29th April 1771:—

"The arguments in favour of the Bill were, that this Bill would in some degree "check the frequent adulteries, as no lady could rely on the promises of a lover to "marry her in case of a divorce: that it would put a lady on her guard against a "false friend, who, under the cloak of friendship, might insinuate himself into the "family, and taking part in the quarrels of man and wife, take advantage of little "opportunities to prevail over the lady's virtue: that the facility with which divorces "were now obtained, made it to be feared, that forgiving people would on false "suggestions, and bare proofs, apply for them, when there was no other cause but "dislike in the parties, and that, in some measure, this would throw a damp on such "applications.

"Mr. Burke did in a very ingenious manner, urge several motives for passing "the Bill. Lords Beauchamp and Strange, and Mr. Fox, opposed the Bill. It was "urged that this would by no means stop the frequency of adulteries, as the prospect "of a future marriage was too distant a temptation to the commitment of it, the "present passions being evidently the cause: that it was levelled against the ladies, "and would leave those who were so unfortunate as to be seduced in the worst "situation possible, in so bad a one, that declaring she should not marry the person "she had sinned with, it must either follow, that she would cohabit with him, to the "scandal of society, or else must be debarred society, and be deemed improper to "marry at all, as none else would probably marry her: that the principle of the "Bill, if extended, would be of the utmost detriment to population, as few marriages "were contracted among the poor people but by the man to the girl he had debauched: "that the Bill was also ridiculous in itself, since it bound the legislature to a rule, "which every subsequent act of divorce might repeal, or confirm, as parliament "pleased, and which rule might be followed by the insertion of this clause, without "a formal act of parliament."

House divided. Yeas, 63. Noes, 56.

30th April.—Bill proposed to be committed, opposed on the same and further grounds.

Yeas, 60. Noes, 80. Bill lost.

A.D. 1779.—"Parliamentary History," vol. 20, 592.

11th March.—Adultery Bill introduced into House of Lords by the Bishop of Llandaff—containing clause prohibiting intermarriage of guilty parties.

30th March.—Bill read a second time.

Earl of Effingham and Earl of Carlisle opposed.

Bishop of Llandaff and Thurlow, L.C., supported, the latter saying he thought it a very proper clause, "for it appeared to him to be the only method of putting "a stop to those shameful intrigues we daily heard of, of paying addresses (called "honourable) to married women, and promising, nay, even entering into contracts to "marry them as soon as they can be divorced."

Bill ordered to be committed.

15th April.—House went into committee.

Earl of Effingham opposed, Bishop of Llandaff supported. Bill went through committee, was reported and passed the House of Lords 19th April.

19th April.—Bill brought into House of Commons.

4th May.—Mr. F. Montague moved second reading.

Lord Beauchamp opposed.

Mr. Fox "entered into a long discussion of the Bill. . . . . He took it "up on the doctrine of non-representation, which he said had been so many years "agitated in that House; he averred the ladies to be totally unrepresented, therefore "entitled to the most tender treatment, in cases where the sexes were to be distin-"guished. He then inveighed against the Bill in its present form, as unequal, "unjust, and tyrannical, tending to do more hurt than good, by preventing the fair "delinquents from making the only atonement to society in their power for past "errors, and driving them to become common prostitutes."

Sir George Yonge, Lord Ongley opposed.

Sir Adam Fergusson, Mr. Moysey supported.

Yeas, 40. Noes, 51. Ordered that Bill be read a second time that day four months.

A.D. 1800.—"Parliamentary History," vol. 35, 225–326.

2nd April 1800.—Lord Auckland introduced Bill to prohibit guilty parties from intermarrying.

The debates on this Bill in both houses fill about 100 columns or 50 pages of the "Parliamentary History."

4th April.—On order of day for second reading.

Duke of Clarence, Earl of Guilford, Lord Mulgrave opposed.

Bishop of London, Bishop of Durham, Lord Eldon, Earl of Carnarvon, Bishop of Rochester, Lord Grenville, and Lord Loughborough, L.C., supported.

For second reading: Contents, 30. Not contents, 11.

16th May.—Order of day for committing Bill.

Lord Auckland said he intended to abandon the Bill as defective and move a new Bill which differed by making persons guilty of adultery liable to be punished by fine and imprisonment, retaining, however, the clause prohibiting intermarriage of guilty parties.

Debate chiefly dealt with this last clause.

Earl of Moira, Duke of Clarence, Lord Mulgrave (in a long speech of nearly 20 columns) opposed.

Lord Eldon, Lord Auckland (in a long speech), Bishop of London, Lord Grenville supported.

Bill ordered to be printed.

23rd May.—Lord Auckland moved third reading.

Earl of Coventry, Earl of Westmorland, Earl of Carlisle, Duke of Bedford, Duke of Cumberland, Lord Mulgrave opposed.

Lord Eldon, Bishop of London, Bishop of Rochester (in a long speech), Lord Grenville supported.

Contents, 48; proxies, 29 = 77.

Not contents, 41; proxies, 28 = 69.

Bill read third time and passed. Protest entered on the Journals by Lord Ponsonby.

26th May.—Bill read first time in House of Commons.

On motion that it be read a second time.

Mr. Bouverie, Sir Gilbert Heathcote, Mr. Jolliffe opposed.

Mr. Pitt asked House not to throw out Bill on a bare first view.

On question being put that Bill be read a second time.

Yeas, 152. Noes, 38.

30th May.—Second reading moved by the Master of the Rolls (Sir R. Pepper Arden).

Sir George Douglas opposed.

Sir William Scott expressed doubts as to policy of Bill, but did not object to its going into committee.

Bill read a second time.

10th June.—Order of day for going into committee moved by Master of Rolls.

Sir Gilbert Heathcote, Mr. M. A. Taylor, Sir Francis Burdett Jones, Sir Ralph Milbank, Mr. Bastard, Sir G. P. Turner, Mr. R. B. Sheridan opposed.

Mr. Erskine, Mr. Windham, Sir W. Scott, the Attorney-General (Sir John Mitford, afterwards Lord Redesdale), the Master of the Rolls, Mr. Wilberforce supported.

Question being put that Mr. Speaker do now leave the chair, House divided. Yeas, 104; Noes, 143; so it passed in the negative. Bill lost.

In the following year, on March 19th, 1801, the Marquess of Buckingham attempted in the House of Lords to introduce a proviso in Taylor's Divorce Bill, prohibiting the marriage of the guilty parties (*see* "Parliamentary History," vol. 35, 1248–64), and a debate ensued in which Lord Auckland, Marquess of Buckingham, Lord Grenville, the Bishop of Rochester, Lord Loughborough, L.C., the Bishop of Durham, Bishop of London spoke in favour of the proviso.

Lord Hay, Duke of Clarence, Earl of Radnor (on ground that House of Commons had expressed its opinion against such a clause), Lord Mulgrave, Earl of Clare opposed.

Contents, 27. Not contents, 24. Majority for the prohibitory clause, 3.

27th March.—Bill as amended reported to House.

Marquess of Buckingham, Marquess of Sligo, the Bishop of Rochester, Lord Grenville, Lord Auckland, Lord Loughborough, L.C., supported.

Duke of Clarence, Earl of Suffolk, Earl of Westmorland, Earl of Carlisle, Lord Mulgrave, Earl of Clare, Duke of Bedford opposed.

Contents, 29. Not contents, 56. Clause rejected.

The result is that on three occasions, in 1771, 1779, and 1800, the House of Lords passed and the House of Commons rejected Bills prohibiting the intermarriage of guilty parties, and in 1801 the proviso in Taylor's Bill was rejected in the House of Lords.

Lord Auckland, having failed to get the House of Commons to accept the principle of prohibiting the intermarriage of guilty parties, moved on May the 2nd, 1809, the present Standing Order on the subject.

See "Parliamentary Debates (Hansard)," vol. 14, 326–335.

Lord Mulgrave, Earl Stanhope, Lord Darnley opposed.

Archbishop of Canterbury, Lord Erskine, Lord Eldon, L.C., Lord Grenville, Earl of Liverpool supported.

For Lord Auckland's motion, 28; against, 12. Majority for, 16. Protests were entered on the Journals by Lords Ponsonby and Berkeley.

18th May 1809 (*see* "Hansard," vol. 14, 612).—A discussion took place in the House of Commons on this Standing Order of the House of Lords, some members (including Sir S. Romilly) expressing their objections to it.

In 1856.—Divorce and Matrimonial Causes Bill of 1856. "Hansard," vol. 143, 251 (3rd series).

In House of Lords, Bishop of Oxford moved clause prohibiting marriage of guilty parties as an amendment—agreed to ("Hansard," vol. 143, 251).

In House of Commons the Bill was read a first time on July 4th, but on July 11th Lord Palmerston (on a motion for deferring the second reading which was carried and involved the withdrawal of the Bill for that session) denounced the clause prohibiting marriage of guilty parties ("Hansard," vol. 143, 710).

Bill of 1857.—In the House of Lords, Lord Wensleydale ("Hansard," vol. 145, 1418–20) moved to amend clause 45 by adding a proviso that "the other party shall "not marry the person with whom the adultery is proved to have been committed, "and the Court in its decree for a divorce is to name that person." This was opposed by the Marquess of Lansdowne, because to deprive a woman of the opportunity of marrying her partner in sin "would be to degrade her utterly, and to drive her to a "course of prostitution."

The Bishop of Oxford said they ought to consider the effect which might be produced by their legislation upon the lowest order of society. "Unless they agreed "to this proviso, they offered great inducements to crime, with the view of dissolving "the marriage tie."

Lord Campbell supported the amendment.

Contents, 28. Not contents, 37; majority, 9.

Therefore proviso lost and clause was left as it is now in the Act.

In the House of Commons, Mr. Rolt ("Hansard," vol. 147, 1760–66) moved to prevent guilty parties marrying each other, but this he did not press to a division, because a motion by him on behalf of another member to prevent guilty parties from marrying at all was negatived by 110 to 50—majority against, 60.

459. It may be gathered that the particular question became somewhat involved, in the debates of 1857, with the general question of permitting any re-marriage of a guilty person.

460. It is said, on one side, that the present law, which permits of the marriage of two guilty persons, affords a direct means of temptation to depart from the path of virtue, because the ultimate consequences are not so serious as they might be made, and because guilty persons may, to a certain extent and in the eyes of some, be treated as "whitewashed" by a re-marriage; and it is said that this means of temptation has an active and baneful operation. The evidence of Mr. Justice Bargrave Deane is as follows:—

> "1022. It has been suggested, Mr. Justice Deane, in some questions that the knowledge that she may be divorced, and then may marry her paramour, will tend to her fall. Have you ever seen any indication of that in any of the cases

that have come before you, including the letters, hundreds of which you must have read?—Numbers of cases."

"1023. You have seen that?—Yes, where the woman who is married to a poorish man meets a man of means, and is attracted by him, and then comes the balance between right and remaining a pure woman with a man perhaps she is not very fond of, or going over the line and being able to marry a rich man whom perhaps she does not care for. There are numberless cases of that."

"1024. Is that the conclusion you have drawn from evidence?—Yes."

"1025. Including letters?—Letters and *viva voce* evidence, and things she has been heard to say."

We refer also to the views expressed by Lord Mersey (Sir John Bigham) (632–5, 1291–2); Canon Hensley Henson (22,876); Dr. Inge (38,678; G.); Sir Edward Carson (41,663–7); Sir Edward Clarke (42,132–4).

461. On the other hand, some important witnesses are against the suggested change, for instance, we may especially refer to the expressions of opinion by Lord Salvesen (6417–21) and the late Sir George Lewis (1624–6).

462. The question then seems to be, what is the true point of view having regard to the best interests of the community as a whole. The prohibition would probably be a strong deterrent to yielding to temptation placed before women of any social position or even in any well-to-do circumstances, but it seems doubtful whether it would have any real effect as a deterrent on those of poorer degree, and it might thus result in the end, in the large majority of cases, in continued immorality, which could not be cured by re-marriage.

463. If such a restriction were to be imposed, it would have to be expressed that such a marriage should be prohibited and not recognised as valid in England, wherever celebrated, which again, in the present state of foreign laws, would give rise to trouble. Further, it would be necessary, if other grounds than adultery are allowed, and a divorce took place on such other ground or grounds, to provide that the marriage of the divorced person with any person with whom adultery has in fact been committed during the dissolved marriage should not be permitted. Unless a provision of this nature be introduced, the law could be evaded, in cases of adultery, by proof of another ground, which would be the ground of divorce selected, or even created, to avoid the operation of the law.

Again, if a married man seduces a woman who believes him to be single, it would be said that it could not be right to prevent them marrying, if he were divorced.

464. After considering what has already taken place in Parliament, and the various arguments for and against permitting a party to a marriage as at present to marry the person with whom adultery has been committed by such party during the marriage, we have come to the conclusion not to advise a change in the law.

Names of Women after Divorce.

465. The question of the right of a divorced wife, innocent or guilty, to retain her married name after divorce was mentioned incidentally in the course of the evidence; and it has also been brought to our notice by letters sent to the Secretary of the Commission. We do not propose to express any opinion about it, as we do not consider it falls within the scope of our Commission. But we have thought it might be useful to embody a statement on the subject in the Volume of Appendices. We refer to the memorandum prepared by the Assistant Secretary (App. XXVIII., p. 191).

Jewish Divorces in this Country.

466. A matter of importance to the Jewish community in this country has been drawn to our attention by the late Dr. Hermann Adler, Chief Rabbi in England; Mr. D. L. Alexander, K.C., President of the London Committee of Deputies of the British Jews; and Mr. H. S. Q. Henriques, B.C.L., representative of the West London Congregation of British Jews and Vice-President of the said Committee. They point out the desirability of legislation with regard thereto.

467. The subject is fully dealt with in the evidence (Vol. III., pp. 408, 412, 417). Mr. Alexander and Mr. Henriques give accounts of the position of the Jews in this country with regard to divorce before and after the Act of 1857. The following passage from the evidence of the former is sufficient to show the legal position :—

"41,482. Before the Act of 1857 what was the position the Jews occupied ?—Before the Act of 1857 the 'Get' was given by the Jewish Rabbis, and they continued to do so until 1866. The history of this is very clear. Your Lordship will probably remember that in 1854 there was a Bill in Parliament which proposed to transfer the jurisdiction, or to give jurisdiction, to the Court of Chancery. When that Bill was before Parliament it was submitted to some legal gentlemen on behalf of the board of which I am now president, and they said that that Bill did not interfere in any way with the power of rabbis to grant divorce according to Jewish law. When the Act of 1857 was passed the opinion of three eminent gentlemen of the Bar was taken as to whether that Act made any difference. The unanimous opinion of those gentlemen, which I have here, was that it made no difference and no doubt, from 1857 until the year 1866, the Ecclesiastical Court—the Beth Din—did grant divorces under the impression, I believe, which was founded on the opinions which had been obtained—legal opinions—that the Act made no difference whatever. But in 1866 the then Registrar-General, Mr. Graham, refused to recognise that practice ; and I think you may take it that from 1866 the Jewish ecclesiastical authorities in this country have always refused to grant any Jewish divorce unless it is preceded by a decree of this country, or, if the domicile is foreign, unless proof that according to the foreign laws that the marriage has been legally dissolved is furnished."

"41,483. You say the Act of 1857 established for the first time that the court could grant divorce. Transferring the Ecclesiastical Court power could not have done that ?—That is so."

"41,484. What was the actual position with regard to a Jewish divorce before 1857. Did the law take cognizance of it ?—My own view is—and Mr. Henriques' evidence will go to this (in which I entirely concur)—that a Jewish divorce was invalid before ; that you could only get divorce by Parliament, of course."

"41,485. Still, you say the Ecclesiastical Jewish authorities acted——— ?—But I do not think if a case had ever come to be contested in a court of law in this country the English courts would have acknowledged the validity of such a divorce."

"41,486. Well, since 1866 it has always been required by the Jewish authorities, before they would act, that the law had acted ; and your point which you wish to have notice taken of is, that it should be made quite clear that these illegal divorces should be stopped ?—Yes, I want to stop them."

"41,487. Whatever the law of England is, that that should precede any religious interference ?—Yes. Of course, we do not want to have the religious divorce entirely stopped. It may follow the civil divorce, but it must not precede the civil divorce."

468. What is complained of was the subject of a statement prepared and forwarded to the Registrar-General in February 1909, a copy of which is set out in Vol. III. (pp. 413–4).

469. The evidence and statement show the precautions taken by the Chief Rabbi in connection with the celebration of Jewish marriages. But certain abuses are stated to occur, with regard to which we take the following passage from the statement aforesaid :—

"But we regret to say that there are some foreign rabbis who have settled in this country who presume to dissolve a marriage between persons residing here by granting to them 'Gittin' according to the mode prescribed in Deuteronomy xxiv. 1–4, the husband under their direction handing a 'bill of divorcement' to his wife without the marriage having been previously dissolved by the Divorce Court of this country."

The cases in which this is done are then given (*see ib.*, p. 413), and the unfortunate consequences of such action are pointed out. It is stated that "these rabbis have been "warned that they are directly assisting at these undeniable results, but without

" avail," and the suggestion made in the statement and supported by the evidence is " to impose a penalty on all persons assisting at or taking any part in the pronouncing " of a Jewish divorce, except after, and on production of, a decree absolute of the " Divorce Court in England, or proof of a previous legal divorce elsewhere."

" The penalty for the offence to be effectual should be severe, so as to prevent it " being considered merely as an additional fee imposed by law on the ceremony."

470. In our view this matter falls within the scope of the terms of our Commission, and we consider that the suggestion aforesaid should be adopted.

PART XVII.

QUESTION VIII.—SHOULD ANY, AND, IF ANY, WHAT PROVISIONS BE MADE FOR PREVENTING OR LIMITING THE PUBLICATION OF REPORTS OF DIVORCE AND OTHER MATRIMONIAL CASES?

The Present Position.

471. This is an extremely important question, and its importance has been felt ever since the establishment of the Divorce Court. Prior to the establishment of that court, cases for divorce by proceedings in Parliament were not sufficiently frequent to give rise to any material objection to the reporting of them such as exists at the present day.

472. In cases in the Ecclesiastical Courts, the evidence was taken in private before an examiner, and the notes of the evidence were placed before the judge at the hearing. Proceedings so conducted are usually too uninteresting to attract public attention, though the same cannot be said of the occasional actions of crim. con. which were brought in the Common Law Courts. We may refer here to the evidence of the late Dr. Tristram (42,245 *et seq.*).

Moreover, before 1857 reports of cases heard in the courts did not so readily reach the masses of the people, because the dissemination of news in the Press before 1857 was insignificant as compared with that which has developed in the last 50 years, and more especially since the Education Act of 1870.

473. At the present day, one court for Probate and Divorce cases sits in London daily during the sittings, and is mainly occupied with divorce and matrimonial cases; the other judge of the Division sometimes also takes part in the disposal of these cases. The witnesses have to be examined orally in open court (*see* section 46 of the Act of 1857) except in certain cases, such for instance as cases of nullity on the ground of impotence (which are heard *in camerâ* in the present court, as they were in the former Ecclesiastical Courts), or where witnesses are out of the jurisdiction, or, from illness or other circumstances, cannot attend in court.

474. The result is that these cases are heard in public, most of them, practically all of them, based on sexual immorality. For the cases of nullity of marriage, of judicial separation for cruelty and desertion, and of restitution of conjugal rights are few. A mass of details, more suggestive than actually indecent, is thus daily placed before the public, notwithstanding the extreme propriety with which counsel, familiar with the work of the court, conduct their cases.

475. The extent to which divorce and matrimonial cases in the Divorce Court are reported may be gathered from the following returns, which have been compiled from copies of the newspapers kept at the British Museum by a research worker recommended by the Superintendent of the Reading Room of the British Museum and appointed by the Secretary with the sanction of the Treasury. In these returns, the figures represent the number of columns respectively occupied by reports of the aforesaid cases, in the newspapers mentioned, for the respective periods against which the figures are placed. The papers differ in size, so that the size of columns differs in the different papers, and some of the papers give a greater number of columns to general law reports than do others.

LONDON MORNING PAPERS.

—	"Times."	"Daily Telegraph."	"Standard."	"Morning Post."	"Daily Mail."	"Daily Chronicle."	"Daily News."
1909.							
Hilary Sittings.	32½	76¾	51½	27¼	56	34	25¾
Easter Sittings.	10¾	9¼	8¾	¾	14	5¼	2½
Trinity Sittings.	9¼	16¾	12¼	3	19¾	11¾	6¼
Michaelmas Sittings.	30¼	23½	15½	4¾	25¼	10¾	9¾
Total for 1909.	82¾	126¼	88	35¾	115	61¾	44¼
1910.							
Hilary Sittings.	10¾	16¾	11¼	1	16¼	7½	4¾
Easter Sittings.	11½	22	15¼	3	21¼	8¾	4¾
Total for period in 1910.	22¼	38¾	26½	4	37½	16¼	9½
Total for period	105	165	114½	39¾	152½	78	53¾

LONDON EVENING PAPERS.

—	"Pall Mall."	"Westminster Gazette."	"Evening Standard."	"Globe."	"Star."	"Evening News."
1909.						
Hilary Sittings.	17	30¾	77¾	50	36¼	50
Easter Sittings.	2¼	6¼	9½	6½	7	4¾
Trinity Sittings.	1¼	3¾	16½	10¼	12¾	8¾
Michaelmas Sittings.	5½	7	29	14½	11¾	11
Total for 1909.	26	47¾	132¾	81¼	67¾	74½
1910.						
Hilary Sittings.	3¼	2½	16½	7¼	7¼	3¾
Easter Sittings.	1¼	11	22½	16¾	12½	9
Total for period in 1910.	4½	13½	39	24	19¾	12¾
Total for period.	30½	61¼	171¾	105¼	87½	87¼

PROVINCIAL PAPERS.

—	"Yorkshire Post."	"Bradford Daily Telegraph."	"Manchester Guardian."	"Liverpool Daily Post."	"Western Morning News."	"Notts. Daily Guardian."
1909.						
Hilary Sittings.	26½	34½	26	34½	12¾	23¼
Easter Sittings.	3	3½	1	1	1¼	3¼
Trinity Sittings.	7	9	2¼	5½	¼	3¾
Michaelmas Sittings.	8	12¼	1½	7¾	4¼	12¼
Total for 1909.	44½	59¼	30¾	48¾	18½	42½
1910.						
Hilary Sittings.	7¾	13¾	1	1¾	¼	3½
Easter Sittings.	8	8	1¼	5¼	2½	11½
Total for period in 1910.	15¾	21¾	2¼	7	2¾	15
Total for period.	60¼	81	33	55¾	21¼	57½

SUNDAY PAPERS.

—	"Dispatch."	"Umpire."	"Sunday Chronicle."	"News of the World."	"Lloyd's."	"People."
1909.						
Hilary Sittings.	37½	81¼	14¾	54¼	38¼	51¾
Easter Sittings.	8½	41¼	2¼	16½	7¾	19¼
Trinity Sittings.	8	60¼	6	21¼	12¼	30
Michaelmas Sittings.	7½	55½	3½	26¾	18¼	27½
Total for 1909.	61½	238¼	26½	118¾	76½	128

—	"Dispatch."	"Umpire."	"Sunday Chronicle."	"News of the World."	"Lloyd's."	"People."
1910.						
Hilary Sittings.	10¼	38¾	1	32¾	16½	39
Easter Sittings.	13	34	6¼	21¾	9¼	21
Total for period in 1910.	23¼	72¾	7¼	54½	25¾	60
Total for period.	84¾	311	33¾	174¼	102¼	188

476. If our recommendations, that divorce and matrimonial cases shall be heard at courts sitting not only in London but in different parts of the country, be adopted, the opportunities of obtaining reports for publication will be largely increased; and it may be expected that they will be extensively used by the local Press, if publication continue to be permitted on the present footing. If, as may not unreasonably be anticipated, the establishment of local courts enables a larger number of persons to proceed to enforce their rights than those who can do so at present, the number of cases will increase, and so also will increase the opportunities afforded for reports of such cases.

477. Shortly after divorce cases began to be published, a protest was uttered by Her late Majesty Queen Victoria, who wrote on 26th December, 1859 to the Lord Chancellor, Lord Campbell, as follows:—

"The Queen wishes to ask the Lord Chancellor whether no steps can be taken to prevent the present publicity of the proceedings before the new Divorce

Court. These cases, which must necessarily increase when the new law becomes more and more known, fill now almost daily a large portion of the newspapers, and are of so scandalous a character that it makes it almost impossible for a paper to be trusted in the hands of a young lady or boy. None of the worst French novels from which careful parents would try to protect their children can be as bad as what is daily brought and laid upon the breakfast-table of every educated family in England, and its effect must be most pernicious to the public morals of the country."

To this, according to the note in "The Letters of Queen Victoria [1837–61]" :—

"Lord Campbell replied that having attempted in the last session to introduce a measure to give effect to the Queen's wish, and having been defeated, he was helpless to prevent the evil."

478. It may be convenient to state what legislative steps have been taken, or attempted to be taken, with regard to this question of publication.

It will be found, on reference to the debates on the Act of 1857, that an effort was made to introduce into clause 50 (which gave power to make rules and orders for procedure) power to make rules "including any rules and regulations for enabling the "said Court to hear any proceedings under this Act in private," but that after debate the amendment was rejected by 131 votes to 23 (Hansard, vol. 147, 1758–9).

On July 28th, 1859, when one of the Acts amending the Act of 1857 was under discussion, an effort was again made by the Lord Chancellor to give the court power to sit with closed doors, and the result of the discussion in the House of Lords was that power to sit with closed doors at the discretion of the judge was conferred by clause 4, which was carried by 26 votes to 9 (Hansard, vol. 155, 51–150).

This clause became clause 5 of the Bill, which passed to the House of Commons, where it was discussed at length on August 11th, 1859, and was struck out of the Bill, without a division (Hansard, vol. 155, 1368–75).

We refer to these debates, and in particular to the speech made by the then Attorney-General, Sir Richard Bethell, in the course of which he said that "the court "was a place of resort—according to the accounts that were given to him—of "characters of the worst description. Crowds congregated there for the purpose of "hearing details which could only give gratification to depraved and diseased minds" (Hansard, vol. 155, 1370). He also pointed out the effects of publicity in embarrassing witnesses and deterring parties from applying to the court, and the lifelong injury which might be inflicted not only on the parties to the suit, but also their innocent and unhappy children. "He thought, therefore, the interests of humanity, the interests "of justice, the interests of public decency, all required that in a tribunal of this "kind there should be an exception to the general rule, such as that embodied in "this clause" (*ib.* 1371).

On the 22nd April, 1887, there was a debate in the House of Commons on a notice on the paper by Mr. Samuel Smith (Flintshire) in the following terms :—

"That this House deplores the evil done to public morals by the publication in the newspapers of the offensive details of divorce cases, and of others of an indecent character, and urges upon the Government the need of strengthening the law against the publication of obscene matter." (Hansard, vol. 323. 3rd series, 1660.)

The present Lord Chief Justice of England, who was then Attorney-General, speaking on behalf of the Government, said that the motives of the mover met with the sympathy of the Government, and that "they agreed that some alteration, if "possible, should be made either in the law or in its practice, so as to put a stop "to what was undoubtedly a monstrous abuse." Several speakers, including Sir Robert Finlay (then Mr. Finlay), supported the views of Mr. Smith. A motion pursuant to the notice was not formally moved.

On May 14th, 1887, a Bill (1887, No. 264) to amend the law as to reports of proceedings in courts of law was introduced by Sir Robert Finlay into the House of Commons. The Bill was backed by Sir Robert Finlay, Mr. Egerton Hubbard, Sir Frank Lockwood (then Mr. Lockwood), Mr. Samuel Smith, Mr. Bryce (the present Ambassador to the United States), Sir Robert Reid (Lord Loreburn), and Mr. Asquith, the present Prime Minister (Hansard, vol. 314, 1942–4, and Commons Journal). The object of that Bill is stated in its first clause as follows :—

"In any proceedings, civil or criminal, in any Superior Court, it shall be lawful for the Court at any time by order to direct that the details of matters

of an obscene or indecent nature in such proceedings, or in any specified part or parts thereof, shall not be published in any newspaper, book, pamphlet, newssheet, placard, advertisement, or other printed document."

The Bill was ordered to be read a second time on 15th June, and was finally ordered to be read on August 22nd, but was not further proceeded with. Identical Bills were introduced in 1888 (No. 188) and 1889 (No. 139). The Bill of 1888 was backed by the same members, with the exception of Sir Robert Finlay, and was introduced by Mr. Lockwood on March 22nd. It was ordered to be read a second time on 17th April, and was finally ordered to be read on 2nd July, but made no further progress. The Bill of 1889 was introduced on February 28th by Mr. Lockwood, and ordered to be read a second time on 11th March. On 27th May it was ordered to be read on the 18th June, but it also does not appear to have made further progress. This last Bill was backed by Mr. Lockwood, Mr. Samuel Smith, and Mr. Hubbard. (*See* Commons Journal.)

On February 28th, 1896, a Bill containing three clauses [No. 17] was introduced into the House of Lords, intituled "An Act to authorise a Court to prohibit the "Publication of Indecent Evidence." It was introduced by the Lord Chancellor, the Earl of Halsbury, and was read a second time on the 20th March of that year. (Hansard, vol. 38, 4th series, 1434.)

The first clause of that Bill is as follows:—

"Where a judge of the High Court is of opinion that any evidence given at any trial before that judge is of such an indecent character that the publication thereof is likely to be prejudicial to public morality, the judge may order that such of the evidence as is specified in the order shall not be published, and any person who publishes or is a party to the publishing of such evidence in any newspaper, periodical, book, or any other public manner, in contravention of such order, shall be guilty of contempt of court and punishable accordingly."

The second clause applied the Act to Scotland, and the third gave a short title to the Act. Although it was read a second time on a division of 48 to 21 and was committed to a Committee of the whole House, it does not appear that it was further proceeded with. It was supported by the late Lord James of Hereford, the late Lord Selborne, the late Lord Norton, Lord Lansdowne, the Bishops of London and Manchester, and the late Lord Salisbury. It was opposed by the late Lord Coleridge, the late Lord Russell of Killowen and Lord Rosebery, and the late Lord Herschell.

479. In Scotland, the Court acts on the view that it is entitled to hear *in camerâ* any case, civil or criminal, which in its opinion it would be detrimental to public morals to hear in public, or in which a public hearing would be prejudicial to justice. All criminal cases involving sexual crimes are heard *in camerâ*, and the power to hear civil cases *in camerâ* is freely exercised. In all cases the judgment or verdict must be given in public.

Foreign Laws.

480. Before proceeding to consider the views presented to us and the evidence which has been given before us on the subject, we think it desirable briefly to refer to the provisions in the laws of foreign countries and the colonies with regard thereto. There will be found in Appendix XVI., pp. 128–36, copies of the returns supplied to the Commission by the Secretary of State for Foreign Affairs, in response to the inquiry, made by the Secretary of the Commission on behalf of the Commissioners, if he would be good enough to cause inquiries to be made in foreign countries as to "whether "there are any, and if so, what laws, regulations, or rules dealing with the publica- "tion in the public press of reports of proceedings in divorce and matrimonial causes."

481. We set out a short summary of the information furnished.

In *Austria*, all divorce and matrimonial proceedings are heard in public, but the Court has power to hear such cases *in camerâ*, in the interests of morality, public order, or justice, or on the application of a party, if private family affairs have to be proved, though in every case the verdict must be given in public.

Publication of proceedings heard *in camerâ* is prohibited under section 309 of the Austrian Penal Code; otherwise there is no restriction on publication.

In *Belgium*, there are no special rules and regulations on the subject, but the witnesses in divorce cases are heard *in camerâ*.

In *Denmark*, there are no special rules or regulations, but the Supreme Court has power to hear *in camerâ* in its discretion.

In *France*, on the other hand, the matter is dealt with specifically. By Article 239 of the Civil Code, publication in the press of proceedings in actions for divorce is prohibited under penalty of a fine of from 100 fr. to 2,000 fr., as provided by Article 39 of the Law of July 30, 1881. Publication of judgments is permitted.

In *Germany*, the Court has power, which is usually made use of in matrimonial cases, to hear *in camerâ* if, in its opinion, harm may be done to public morality, or to the Commonwealth (Dr. Neuhaus, 42,839), and by section 184 (*b*) of the Criminal Code, publication of proceedings heard *in camerâ* is prohibited.

In *Greece*, there are no special laws, rules, or regulations, but it is stated that Article 21 of the Press Law of the 6th September, 1833, which prohibits the publication of anything hurtful to religion or public morals, would render possible the suppression of such reports, if any appeared.

In *Italy*, where the Courts have no power to grant a divorce *a vinculo* but only *a mensâ et thoro*, in contentious proceedings the Court has power to try *in camerâ* all cases where publicity may be dangerous to public order or morals by reason of the nature of the case, and publication of any proceedings heard *in camerâ* is prohibited.

In *The Netherlands*, divorce and matrimonial causes are heard *in camerâ*, so that it is impossible to publish reports of proceedings in the press.

In *Norway*, no special regulations seem formerly to have existed with regard to divorces which were, as a rule, granted by Royal Licence. By the 11th paragraph of the Law of August, 1909, however, divorce and matrimonial causes are heard *in camerâ*, and the Court has power under paragraph 131 of a Bill regarding the courts of justice, which was before the Storthing in 1910, to prohibit publication, if it thinks fit.

In *Portugal*, recent changes have effected great alterations in its law, and we are not able to say from the material before us what is the exact position with regard to the matter, but we understand that in divorce cases the Court has discretionary powers according to the nature of the cases, and that in nullity cases the publication of any part of the proceedings, other than the decision of the Court, is prohibited.

In *Russia*, all proceedings in divorce and matrimonial causes are conducted before the Ecclesiastical Consistories, which sit *in camerâ*, and by the Russian Penal Code, Article 1038 (1), vol. XV. of the "Corps des Lois," and the Press and Censure Statute, Article 78, vol. XIV. of the "Corps des Lois," publication of all reports of proceedings which are conducted *in camerâ* is forbidden.

In *Spain*, where the Courts have only power to grant divorce *a mensâ et thoro*, in the Civil Courts the court has power to hear *in camerâ*, and in the Ecclesiastical Court such trials generally take place *in camerâ*.

In *Sweden*, the press has full power to publish the reports of all proceedings in the courts, but in some circumstances there can be no publication of such causes, without the consent of the parties if they are alive, or if they are dead, for 50 years after they are dead. Otherwise a fair report is permitted, but anything in the proceedings which is of a disgusting character or is highly offensive to modesty, or which concerns persons who are not parties to the case, and is unreasonably offensive or defamatory, may not be published, unless the judge so orders.

As to *Switzerland*, in all cantons the Court has power to prevent the publication of cases, which could offend public morality, and in various cantons all divorce cases are always heard *in camerâ*.

In the *United States*, there would appear to exist, generally, a feeling throughout that country antagonistic to any interference with the liberties of the press, so that the only restrictions on the right to publish divorce proceedings are those imposed in the interests of decorum or good morals. There are, however, in some States of the Union specific provisions with regard to the power of the court in such matters, which will be found set out in the answers to the questions submitted by Mr. J. Arthur Barratt to American jurists in various States of the Union (Q. 10, in Appendix XII.B., pp. 96–115).

482. As to our colonies, the matter has been the subject of legislation in Queensland and New Zealand. In Queensland, by the Matrimonial Causes Act, 1897, the court has power to hear a matrimonial action in chambers, and may forbid the publication of evidence taken thereat. In New Zealand, by section 65 of the Divorce and Matrimonial Causes Act, 1908, in the Consolidated Statutes of New Zealand, the court may, on the application of either of the parties or at its discretion, if it thinks it proper in the interests of public morals, hear any matrimonial suit or proceeding in chambers, and

may at all times in any such suit or proceeding, whether heard in chambers or open court, make an order, forbidding the publication of any report or account of the evidence or other proceeding therein, either as to the whole or any portion thereof, and the breach of any such order or any colourable or attempted evasion thereof, may be dealt with as contempt of court.

483. It will thus be seen that in all those European countries as to which we have received information, and in certain States of the United States and in the two colonies above mentioned, provisions exist of such a character as to impose much greater restrictions on the publication of matter tending to be prejudicial to morality, where they do not prohibit it entirely, than exist in England. Those laws either require cases of the character in question to be heard *in camerâ*, or give extensive powers to the judges of clearing the courts (with the result that, whenever a case is heard in private, there can be no publication of a report of it), or they prohibit publication. Certain of the Codes contain penalties which are inflicted for the infringement of these provisions.

484. We have already alluded to the very limited powers which exist in England of hearing cases *in camerâ* in the Divorce Court. The only Statute, to which we have been referred, dealing with the subject of publication of such cases in England, is the Statute of 1888 (51 & 52 Vict. c. 64), the Law of Libel Amendment Act, 1888. The 3rd section of that Act is as follows:—

> "A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter."

We may note that the recent Children Act, 1908, s. 111, gives certain powers to courts of summary jurisdiction to hear cases in which children are concerned in private, and the Incest Act, 1908, requires cases under it to be heard *in camerâ*.

Consideration of the Subject.

485. We are in a more favourable position than those who have previously made attempts at legislation on this subject, for we have had a full inquiry into the subject, and have been assisted in forming our conclusions by the great body of evidence, which has been presented to us.

486. Two views were brought before us. One that the publication of reports of divorce and matrimonial cases is unnecessary and undesirable, and bad for the country. Several important witnesses, however, suggest that the anticipation of publication has little, if any, deterrent effect upon the commission of acts of immorality, though it may have an effect upon the course of the proceedings in court. The other that publication is in the general interest, and that the fear of public exposure is a deterrent to the commission of acts of immorality.

487. The first view was supported by a body of evidence of great importance and weight given by a number of persons in what they consider the public interest. As an illustration, we refer to the evidence of Mr. R. Peacock, President of the Chief Constables Association. He presented the views of 98 Chief Constables in England who were, with one exception, unanimous in stating the deleterious effects, especially upon young persons of both sexes of the poorer classes, of the publication of the details of these cases (9288–98).

We also refer to the evidence of Mr. Justice Bargrave Deane (834–43); and to the evidence of the Lord Chief Justice of England, which appears to be so important that we have set out below the questions and answers giving his views upon this matter.

> "15,535. May I pass on to a very important matter, on which your experience will be of the utmost value; that is the question of the publication of divorce cases?—I have the strongest opinion about this. I have worked in a small way upon it for many years in connection with other people who have done more. We deal with this question from the wrong standpoint, I think. I consider there

ought to be the fullest publication of the names of the people who have got into the Divorce Court, to use a popular expression, against whom a decree has been made; whether or not the names of people who have been found not guilty should be published is a difficult question. It depends largely on the wish of the person. In many cases it would be a hardship to say a case had been brought against a man and he had been acquitted, because many people will not notice the acquittal, but will think where there was some smoke there was some fire. I am dealing with the guilty people. The right course is to publish as publicly as you like the names where they have been found guilty either as co-respondents, or as respondents. The other things that ought to be published are the opinions, the judgments of the court, in important questions of practice, and those will be absolutely free from any objection. They are for the guidance of the profession."

"15,536. Those are allowed now?—They, of course, should be published. I only mention that because the question has come before us in connection with criminal law, as to how far there should be reports of such proceedings in the criminal courts, and the judges have resolved that the results of cases should be published, and that the opinion of the judge for the guidance of other people should be published. Once you have done that you do not want anything more from the point of view of publication. Now I come to the evil of it. I have had for years brought to my attention the mischief done by the reports in certain low-class papers of the details of divorce cases. You cannot touch them for indecency in the ordinary sense of the word, or for obscenity. There may be gross cases in which you might be able to, but I am speaking of those which do as much evil, I mean the accounts which are put in head-lines, 'the ladysmaid's evidence,' and 'the housemaid's evidence,' which is followed up in these papers by a detailed account of question and answer; of the servant going to the room and saying what she sees, and incidents which the prurient mind fastens on, which could do infinite harm to young people. It has been said in evidence before this Commission that cases have been known where absolute evil has been done by these stories being read by young people, and I cannot see the slightest ground for the publication."

"15,537. The only ground suggested is that it is a deterrent to people?—I do not believe it for one moment. I am afraid there are people who do not mind their name appearing in the court. If it be a deterrent, it is not as much so as the fact of a person appearing in the black-list as being guilty under circumstances which attract nobody. I cannot understand how that publication can be a deterrent."

"15,538. Your view is that the greater evil by far is the detailed accounts?—Yes. I do not agree about it being a deterrent to the person who has come to the court as a guilty person. It is not a deterrent. The mischief done to the young is incalculable, particularly to boys and girls between the ages of 14 and 18. This Commission has had accounts, I believe true accounts, of the terrible extent to which immorality does exist between people of that age. It is largely promoted by this sort of publication. Ideas are put into their minds, and there is nothing to be gained by it. I want to remind you of what happens. They do not report every case with all these details, but in some of the papers, I am sorry to say frequently the Sunday papers, those that come out on Sunday, you will find extraordinary disclosures, and then there will be one case which will be taken, and all these suggestive details—I do not use the word 'indecent' because the mischief is not done by the indecency of them, but by the suggestion. They are not obscene or indecent; very few of them are within the case of Regina *v.* Hicklin and those sort of cases, but the mischief is done by the suggestions that are made. I have not been able to understand what public use could be obtained by boys and girls or anybody, servants particularly, being allowed to read the details of some adulterous intercourse which has taken place at an hotel, or at some place which has to be proved for the purpose of the court. I have watched this, and I have never seen any advantage, and the best of the Press entirely agree with this view. They do not publish those things; it is only the papers that are cheap and do harm that publish the detail. Therefore it is not necessary in the administration of justice it should be done. We have never grappled with this evil with half the courage we ought to have."

488. Further, evidence was given as to certain detrimental effects, by the fear of publication in these cases, upon the proper administration of justice, *e.g.*, deterring nervous persons from going into the witness box to support their cases; hindering witnesses from coming forward and giving evidence; providing opportunities for improper pressure being put upon parties, either to stop their cases, or not to defend, or even to pay money to prevent exposure.

489. It was also suggested to us that one of the worst results of permitting the details of these cases to be circulated, quite apart from the feelings and interests of the parties to such cases, is the fact that innocent children have the opportunity of reading the miserable details of their parents' lives which, although they would naturally become aware of a decree and its consequences, might never be brought before them unless by the public newspapers.

490. We have also had a number of witnesses representing the Press who agree with most other witnesses in thinking that the publication of minute details of these cases is an undoubted evil; and who have told us that, while the abuse of publicity is mainly confined to papers of a certain class, yet that the better class papers think themselves compelled by the competition of others less scrupulous to give more particulars than they otherwise would. It is admitted that many of the readers of newspapers complain of the publication of these reports.

491. The other view was, as stated above, that publication acts as a deterrent to the commission of acts of immorality, and that it was in the public interest that divorce cases should be fully reported.

492. Efforts were made to obtain the attendance of witnesses, to whom questions might have been directed with regard to Sunday and other weekly publications, but we have not been able to secure their attendance (the Secretary, 37,209 *et seq.*, 37,241–3).

493. The evidence of the witnesses connected with the Press deserves careful study. We do not think we can usefully attempt within reasonable bounds to set out all their views, and give all the reasons with which they supported their conclusions. But we think it will be of use to indicate, from their evidence, to what extent suggestions were made for the amendment of the law and practice.

The first witness was Mr. A. G. Jeans, managing director of "The Liverpool Daily Post" and other Liverpool papers (37,259–37,437), who suggested (37,274) that the newspapers should not be permitted to give the evidence in divorce cases, but simply the summing-up or judgment of the judge. This witness among other matters stated that which appears to be in accordance with the evidence of most of the witnesses who spoke on this subject, viz.: that, on the whole, the reports have been given as inoffensively as possible by the more reputable journals, but that there is a class of paper—chiefly weekly penny papers which have mainly a working-class circulation—which gives great prominence to and pretty full details of such reports.

Mr. Russell Allen, proprietor of "The Manchester Evening News" (37,438–37,551), had no hesitation in saying that the proprietors of newspapers, who have a proper sense of their responsibilities, would welcome regulations, which would keep the reports of divorce cases within such limits as to be harmless to the public, without shielding the guilty parties from the publicity they deserved (37,446). He suggested (37,447–8) that there should be an official reporter connected with the court, who would know what was proper to give, and to whom others might apply, and thus competition would be avoided.

Mr. John Thomas Smith, Chairman of the Central London Branch of the National Union of Journalists (37,552–37,665), did not suggest direct interference with reporting, but thought (37,581) that, if societies of newspaper owners and the various kindred organisations throughout the country are appealed to, they could do something to stop the publication of extremely offensive details.

Mr. Charles Moberly Bell, the late managing director of "The Times," (37,666–37,816), suggested (37,685) that it would be possible for the Divorce Court to exercise an indirect but effective control over reports, if the publication of any such report were forbidden, unless signed by one of a corps of reporters licensed by the Divorce Court to report, and whose licence could be revoked.

Mr. H. A. Gwynne, editor of "The Standard" (37,817–37,949), thought (37,819) that the greater number of journalists do not approve of legislation in matters which concern the conduct of their papers, and that the difficulties in the way of legislation will be so enormous as to render it almost impossible; would see (37,827) no objection to the court closing its doors in any case of an offence of a sexual character; found, from inquiry among his colleagues and friends on the press as to what rules govern their conduct, that they are practically unanimous in keeping out anything of a sordid and filthy nature (37,828); thought that the restriction of publication to the judgment or summing-up would meet the case (37,828–9); thought it was on the lines of education that progress towards the elimination of obscene, filthy, and suggestive matter in the press will be best and most thoroughly attained (37,835); and said that, as far as he was concerned, he should be delighted to see all reports of these cases cleared away by law (37,881–97).

Mr. Harold Hodge, editor of "The Saturday Review" (37,950–38,059), proposed three alternatives, either no report, or a report of results, or a report supervised in some way (37,955–6), and he preferred no report.

Mr. J. S. R. Phillips, managing editor and editor-in-chief of "The Yorkshire Post" and its other papers (38,060–38,248 and notes in Appendix XVII., pp. 136–40), was generally against legislative restraint on publication, but was opposed to the publication of any matter which is obscene or indecent (38,083), and thought there may be an excess in the amount of publication of reports, and he would not deny that there is in some cases; he did not see how to limit it, without going further than he would think desirable, that is, how to limit it by legal means; it can be limited by editorial discretion; that is one way (38,084). He thought there ought to be a somewhat stricter rule in regard to the checking of the publication of indecent matter, and would support any change in the law or any additional strictness of administration, which would deal with that all round (38,101, 38,151, 38,177).

Mr. John St. Loe Strachey, editor of "The Spectator" (38,249–38,273), suggested that it should be the practice of the judge, whenever he is of opinion that the reporting of evidence or of statements by counsel would be injurious to the public interest and contrary to good morals, to indicate to the reporters and to all persons present in court that such-and-such testimony by witnesses or statements by counsel ought not to be published in the press or elsewhere, and that he would treat the publication of the passages as contempt of court (38,252).

Mr. Sidney Low, formerly editor of "The St. James' Gazette" (43,339–43,393), mentioned several alternatives, but in answer to Question 43,367 said, "I suggest " that the way out of the difficulty is to prohibit full publication by the newspapers " and to substitute a brief official report. I think that is the way out."

Mr. W. T. Stead, late editor of the "Review of Reviews" (43,394–43,470), had no objection to the prosecution before a jury of any book, magazine, or newspaper which publishes obscenity, even in a privileged law report, unless it can be proved that without such obscenity the law could not be intelligently reported (43,403), but would otherwise rely on the force of public opinion and moral suasion and the discretion of the editor (43,403–22, 43,445).

Mr. C. P. Scott, editor of "The Manchester Guardian" (43,471–43,528), while admitting that a very great deal is published which is to be extremely regretted and is extremely reprehensible, appeared to attach primary importance to the freedom of the Press, and thought that on the whole the disadvantage of any restriction would outweigh the advantage, and that all the suggestions made to the Commission seemed to him either undesirable or impracticable (43,500 *et seq.*, 43,517), but that the law against obscenity should be enforced (43,512).

Mr. David Edwards, managing director of the Nottingham Daily Express Company, Ltd., and formerly general manager and editor of "The Daily News" (43,529–43,559), favoured reports of divorce cases being published, giving anything that is of value from a legal point of view, or which might be of value in the case as governing certain aspects for reference in similar cases, and would have no personal objection to go the length of abolishing any report of any kind whatever of a divorce case, but does not advocate it (43,547–50).

494. With the evidence before us, we take it as established that the evils of excessive publication are real and serious. When we come, however, to consider the remedies, we are confronted with a great variety of opinions. On the one hand, it is admitted that the liberty of the Press should be exercised for the public benefit, and is not so

exercised when it is used to disseminate among the masses of the people literature of a demoralising tendency; on the other hand, there is a genuine anxiety lest, in seeking to cure this abuse, we should obstruct the free play of a healthy public opinion.

495. While recognising to the full the force of the public sentiment in favour of the liberty of the Press, we are yet of opinion that, in the special class of cases we have to consider, the general privilege of the publication of reports is not adequately limited by the said third section of the Act of 1888.

496. The question then is, how should the evil be dealt with? Various suggestions have been made as to the prevention or limitation of reports.

Two things have to be borne in mind. First, the effect upon the public of the publication of these details, and second, the difficulty of properly administering justice in this class of case in open Court, where witnesses have frequently a difficulty in giving their evidence.

497. We recall the facts already mentioned. It is the practice to take certain exceptional cases *in camerâ*, for instance, nullity cases on the ground of impotence. This practice has always existed in the Ecclesiastical Courts, which Courts seem to have acted on the principle that they had power to hear any case in private, if they chose to do so. Another instance of cases, which are by Statute to be heard *in camerâ*, are those under the Incest Act of 1908.

Again, there is the decision of the late Lord St. Helier (Sir Francis Jeune), in which, as we understand, he considered that, in the interests of decency, or in the interests of justice, where the case could only be properly tried *in camerâ*, he had power to close the court.

This was a case reported in L.R. [1903] P. 144, under the title of *D.* v. *D.*; *D.* v. *D.* and *G.*

The headnote is as follows:—

> "The court possesses inherent jurisdiction to order any case to be heard *in camerâ* in a suit for judicial separation by a wife the particulars in which disclosed allegations of filthy practices, but in which no suggestion was made of sodomy or bestiality. The court, notwithstanding the fact that with the wife's suit had been consolidated a suit by the husband for dissolution of the marriage on the ground of the wife's adultery with the co-respondent, ordered, with the consent of all parties, that the case should be heard *in camerâ* by a judge sitting with a special jury."

Lord St. Helier in his judgment referred to the difficulty he had felt in hearing such cases in public, and to the difficulty of not being able to press questions to the extent that they might be pressed, because of details which no right-minded person would wish to press before a mixed audience of men and women. He said that, "If justice "cannot properly be done by hearing a suit in public, the court is justified and has "power to hear it *in camerâ*."

498. It seems probable that, although there is no statutory power to close the court, if a trial cannot be properly conducted with decency and justice, the judge has inherent power to order the court to be closed, a power, however, which he would feel some difficulty in exercising unless he felt himself backed by express statutory enactment. Lord Halsbury, in the debate on the Publication of Indecent Evidence Bill, 1896, said on this point:—

> "It had been held that the Lord Chancellor or the judges having jurisdiction in lunacy, had power to sit with closed doors in lunacy, and it had also been held that the Court of Chancery had power, when dealing with its wards, to hold its inquiries with closed doors. These cases were not exceptions to the general rule, because, in the ordinary sense, the administration of justice was not concerned. The only other case he was aware of, of power to try a case with closed doors, was that where the object of the action might be absolutely destroyed by the hearing in public. He was not aware of the right of the Divorce Court to sit *in camerâ*."

Lord Halsbury did not consider that a case could be heard *in camerâ* by the consent of the parties.

499. We may here notice that the Act of 1888, the clause of which is above set out, uses the words "indecent matter,"

Reputable newspapers in this country which have regard for their duty towards the community do not publish reports of an indecent character, and, indeed, it would be generally difficult to find, in any newspaper, reports which can be strictly called indecent within the meaning of positive legislation, so as to subject the offenders to prosecution. But where prominence is given to reports of divorce and matrimonial cases, and they are reported in detail, the reports dwell in an excessive degree upon sexual relations, and tend both to bring marriage into disrespect, and to create a demand for reading of this character.

500. Among the suggestions which were made to us were the following :—

(1) The exercise of discretion by the judge as to what should be reported, which would involve revision by him of the reports; (2) revision of the reports by an official appointed for the purpose ; (3) reporting by official reporters ; (4) reporting by licensed reporters.

In substance, these suggestions, and possibly others of a similar character, involve the revision of reports, so that no suggestive details shall appear in them, and a large restriction upon the present rights of the Press.

501. None of these suggestions appear to us either practicable or desirable, and we do not recommend their adoption.

502. Some other suggestions were made but, in our opinion, the only practicable alternatives, which can profitably be considered, are :—

(1) Hearing *in camerâ*, which necessarily involves the prohibition of publication.
(2) Hearing in open court, with prohibition of publication.
(3) Hearing in open court, with prohibition of all reports, except a record of the names of the parties, the charges made, and the result.
(4) Hearing in open court, without prohibition of publication, but with restraint of such publication as is beyond all necessity in the public interest and is deleterious to public morals.

503. As to the first method, we think that it is opposed to general English sentiment, and we do not recommend its adoption, except in cases which are at present heard *in camerâ*, and in other cases which, if our recommendations be adopted, ought to be heard *in camerâ*, *e.g.*, nullity on the ground of non-disclosed disease.

504. With regard to the second and third methods, we consider that there are many difficulties in the way of complete prohibition of publication of reports of cases heard in open court, even if the jurisdiction of the court remain as at present. Such prohibition would, in our opinion, be contrary to the general principle that that which is heard in public should be open to general reporting.

505. But there is another reason affecting these methods, which we do not think was in the minds of those who gave evidence upon the point. Under the present system, the great mass of the cases heard in the court are cases of divorce on the ground of adultery. But if the other causes which we have recommended or any of them should be introduced as grounds of divorce, cases of adultery will no longer be the only cases which are heard in the court: cases will be heard in which no sexual details will be involved, and cases of divorce on the ground of adultery will only form part of the general work of the court.

Cases of desertion, cruelty, insanity, drunkenness, and imprisonment do not necessarily involve any unpleasant details of a sexual character. They would not necessarily excite any morbid curiosity, and there is no special reason for applying to them a principle different from that which is applied to the hearing of any ordinary case heard in court. It follows, therefore, that evidence, which had in view the cases that now form the chief business of the court, does not apply equally to other cases, which will arise if the recommendations of this Report are adopted, and we think that publicity will be an important element in the new jurisdiction that we propose. We are, therefore, unable to recommend either complete prohibition of publication, or limitation in the manner suggested in the third method.

506. The fourth method suggested would, however, in our opinion, meet the difficulties of the matter, and the only question then would be in what manner and to what extent should restraint be imposed.

Conclusions.

507. We think that the following suggestions would meet the difficulty.

508. It seems possible that a judge hearing a case or any proceeding has power to close the court for the whole or part of a case, if the interests of decency, morality, humanity, or justice so require. This power at present remains in a somewhat vague condition, and judges feel difficulty in acting upon it without express statutory provision.

Our *first suggestion* is that such a power should be expressly conferred by Statute.

509. A power of this character was exercised, as already stated, by the Ecclesiastical Courts, and is still exercised in nullity cases on the ground of impotence, which are not suitable to be heard in public. Other cases may arise under our recommendations which may require the exercise of such a power, *e.g.*, nullity on the ground of non-disclosed disease, &c.

510. We may further illustrate the need of such a power in this way. In many cases of sexual misconduct, the details may be so contrary to the interests of decency and morality that they ought not to be heard in public nor be published. In some cases, where children are giving evidence against a parent, it may be contrary to the dictates of humanity that they should be compelled to give their evidence in public; and again, in some cases it is practically impossible for some witnesses to do adequate justice to their evidence, if they are compelled to give it in a crowded court, and justice seems to dictate that the judge should be enabled to take their evidence in circumstances which would be free from this embarrassment; and, again, such a power might enable the parties to produce evidence from persons who, for various reasons, refuse to give evidence at all under present conditions.

511. Apart from the cases, which it may be necessary to hear *in camerâ*, there are other cases in which portions of the evidence, correspondence, documents, or speeches may be unsuitable for publication in the interests of decency or morality.

The *second suggestion* is that statutory power should be given to a judge to order in court during the conduct of a case or proceeding, or at its conclusion, that the portions of the evidence, &c., of the character referred to must not be reported or published. This second suggestion is in accordance with the great weight of the evidence.

512. The second suggested course will be rendered easy by the adoption of the third suggestion made later, though it would not be so practicable under the present system of reporting and publishing as a case proceeds.

513. The ground for closing a court, or of making such an order as aforesaid, should be stated by the judge at the time. The judge in exercising those powers should have regard to the possible effect on the character of individuals who may be brought into the proceedings.

514. The *third suggestion* is that there should be no publication of the report of a case or proceeding until after it is finished.

An unhealthy and unnecessary interest is created in cases, which are prolonged by the continued publication day by day of the account of the proceedings, assisted by posters drawing attention to them; persons who have no real interest in the case are thereby attracted to the court; and a case reported in this way attracts far more attention than is reasonable.

The only possible objection that we can see to this course is that in some cases it is possible for persons to come forward as witnesses who might not be able to do so, if a case were only reported after it was over. But we believe that this is a

matter of very rare occurrence, and that this objection is entirely outweighed by the general considerations on public grounds which we have presented. Moreover in these cases the King's Proctor will have power to intervene, if matters which ought to have been before the court are afterwards drawn to his attention.

We venture to hope that the Press generally will be disposed to welcome this suggestion, as considerably reducing the space which they require to give at present to reports of cases lasting for a considerable time. The effect would be largely to reduce reports of sensational cases, not only in the daily press but also in the weekly papers, which probably utilize the daily reports in order to make up their weekly edition.

515. The *fourth suggestion* is that publication of pictorial representations, whether produced from photographs, drawings, or otherwise, of parties, witnesses, or others concerned in divorce and matrimonial cases should not be permitted.

On August 9th, 1906, Lord Gorell, then President of the Divorce Division, in order to put a stop to a practice which had grown up, directed that sketching in court would no longer be permitted, on the grounds (which he publicly stated) that he was convinced that many persons who have to give evidence in cases in the court were embarrassed and rendered more self-conscious and nervous than they otherwise would be to an extent which affected the proper giving of their evidence, and that this acted to their prejudice, and might thus interfere with the due administration of justice. He said, further, that pictorial illustrations, which may draw attention to divorce cases, are not necessary, nor can they be said to be really desirable in the public interest, but the action he proposed to take was on the grounds already stated; that he did not suppose that it had been realised how the taking of these sketches might affect the witnesses in the course of the cases, and that he expected that he had only to intimate how the practice might affect trials there, and those who have hitherto followed it would realise the effect which he and his brother Judge thought it had, and would cease from the practice. (*The Times*, 10th August, 1906.)

The rule only applied, in terms, to sketching in court, but intimation was afterwards, on 12th March, 1907, given to the effect that the President and his brother Judge entertained a strong opinion as to the undesirability of directing special attention to cases in the Divorce Court, by illustrations taken, either in or out of court, principally on the ground of the effect which they have on the proper trial of cases in the court, and also on the ground that it is not in the public interest that such illustrations should be published. The President further stated that it had been a source of gratification to him that his views on the subject had met with acceptance and been acted on, and that he was satisfied that a very distinct and noticeable benefit to the administration of justice in the court had resulted, that he had been informed that since last August in only one or two instances had any such illustrations appeared, and he had some ground for supposing that these may have been due either to inadvertence or to misappreciation of what he had intended to convey, and hoped that after this statement it would not be necessary to refer to the matter again. (*The Times*, 13th March, 1907.)

Since that time we understand that not only has the rule laid down been generally observed by the Press, but that they have themselves voluntarily accepted and acted upon the suggestion made, so that illustrations even from sources obtainable outside the court have practically ceased.

Our fourth suggestion, therefore, will only declare what is now commonly acted on, but will prevent the publication of these illustrations by anyone who chooses to depart from the course adopted by the Press generally.

516. We recommend that any publication relating to a case heard *in camerâ*, or to that part of a case which may have been heard *in camerâ*, which infringes the provisions made for giving effect to these suggestions, should render the person infringing liable for contempt of court.

517. This recommendation, however, is not intended to affect such rights, if any, as may exist of reporting without names in recognised legal publications such legal points as occur in cases before the courts.

518. It is difficult to draw any conclusion from the experience of other countries. A rule of privacy for the Divorce Court may follow either from a fear of contaminating

the public mind, or from a lenient view of matrimonial offences and a general disposition to regard the dissolution of marriage as a private affair of the parties concerned, in which the public has no interest, and the characters of the litigants are not at stake. The English view is that divorce is a grave matter, which concerns the public as well as the parties, and in the English courts the characters and the future prospects of the litigants are seriously at stake. This establishes a presumption, which we feel it impossible to ignore, in favour of publicity for divorce, as for other legal proceedings.

At the same time, we have been greatly impressed by the evidence which has been laid before us as to the corrupting and demoralising consequences which follow from an excess of publicity in this class of cases; and while proposing certain safeguards and limitations which we believe will greatly mitigate this abuse, we should like further to express our hope that the proprietors and conductors of newspapers will do their utmost of their own free will to check what they have acknowledged to be a serious evil. The witnesses, who have appeared before us on behalf of the newspapers, have been unanimous in condemning the excess of this class of reporting, and many of them have deplored the competition which, as they think, compels them to do more than they would desire to do, if they were free agents. We feel confident that the attention which has been drawn to this subject will strengthen the hands of those who desire to raise the standard in this matter, and help them to exert their influence on the side of moderation.

519. If it should be found that the provisions we have proposed have not the effect which we anticipate, it may be necessary for the Legislature to strengthen the law further in the direction of prohibiting reports which are deleterious to public morals.

520. Our functions in this report, so far as publication is concerned, are limited to recommendations with regard to the publication of reports of matrimonial cases and applications for separation orders; we have already made some suggestions with regard to separation orders, and have now expressed our views with regard to matrimonial cases; but these matters form, in our view, only part of a much larger question as to the reporting of civil and criminal cases, which may contain matter deleterious to public morals. If any general legislation on this subject should at any time hereafter be introduced, the whole subject would naturally be dealt with. At present we make the suggestions aforesaid for the purpose of dealing with the particular classes of cases, which we have under our consideration.

PART XVIII.

The Position of the Clergy of the Church of England.

521. We have already set out the 57th and 58th sections of the Act of 1857 (p. 16), which provide that no clergyman of the Church of England shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, but that, if any minister of any church or chapel of the said Church shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, any other minister of the Church of England, entitled to officiate within the diocese in which such church or chapel is situate, may perform such service in such church or chapel.

522. It will be noticed that these clauses only dealt with the re-marriage of a person, whose previous marriage has been dissolved on the ground of his or her adultery. The Bishop of St. Albans (Vol. II., p. 340 *et seq.*) pointed out the difficulties which at present arise, where a man or woman has obtained a divorce outside England on grounds not recognised by the Act of 1857, and desires to enter into a second marriage in church in England. He referred to a letter expressing the opinion of his Chancellor on the points, and stated that the provisions of that Act only applied to divorces in the English Divorce Court.

The following passages from his Lordship's evidence summarise his views on the position sufficiently for present purposes :—

> "21,111. . . . I only wish to say this (because I wish to confine my evidence to this particular point—the liability in respect of taking marriages of divorcees), I want to say just this. First of all, it is felt by a great many of the clergy to be a very serious grievance that they are obliged to marry anyone who has been divorced. It is almost unanimous, I think, the feeling that the guilty person in a divorce case ought not to be married in church, albeit if by the Divorce Act the guilty person is able to force such a marriage if any clergyman can be found to do it. But if the law were to go further, and to extend the grounds on which divorce is given, and if, further, the law is, as my Chancellor, Mr. Kempe pronounces it, and a clergyman is now bound to take such a marriage, and the only way in which I can help him is by vetoing a prosecution which may be brought to bear upon him in the Ecclesiastical Courts, then I can only say that the relations between Church and State will be strained to their very last possible point. I do not hesitate to say for myself that the conclusion which I have been coming to for a long time, a conclusion which many others besides myself have come to (it is not a conclusion which will be very palatable to every one, but it is a conclusion which I have seriously come to) that the only final solution is to be found in universal civil marriage, the religious bodies being free to lay down their own rules with regard to the bestowal of the Church's benediction."
>
> "21,112. I might supplement by suggestion your two cases of divorce which you mentioned—one American people and the other Ceylon people—by the case of Scotland. I dare say you know that divorce can be obtained there by domiciled Scotch people on the ground of malicious desertion alone ?—Yes."
>
> "21,113. What you have been saying, I take it, would apply very forcibly to that class of case ?—I think so."
>
> "21,114. If one of those parties desires afterwards to be married in England, it is analogous to the two cases you have given ?—It is."
>
> "21,115. That might very frequently happen ?—I have not myself come in contact with it, but I have no doubt it might happen constantly."
>
> "21,116. I mean there is a ground there which at present is not recognised as a ground in this country ?—True."
>
> "21,117. How does what you have been good enough to put before us bear upon the position in case the English Divorce Act extended the grounds (a new Act extended the grounds) to such cases as are at present recognised in some other countries ; for instance, to take the concrete case of malicious desertion ? —I venture to think it would so strain the relations between Church and State that you would have an absolute refusal on the part of a great number of the clergy to take such marriages under any circumstances whatever. It is held

that while the essence of marriage is in contract, the blessing of the Church ought not to be asked for in cases where the divorce is granted on grounds which apparently are not recognised in the Word of God at all—in the Bible—and have never been recognised by the Church as a divine society; and therefore the clergy generally, if they were asked to take marriages, if the grounds of divorce were to be extended, I venture to say they would absolutely refuse—the great body of them."

"21,118. I think that is really all you wanted to put before us?—That is all.

"21,119. May I sum it up in this way: the position that the Church would be placed in, if divorce was granted on the grounds which they conscientiously think ought not to be permitted?—Yes."

* * * * *

"21,156. (*Lord Guthrie.*) Now, Bishop, why cannot it be met by a protecting clause which would prevent the distinct situation you have put, and exempt clergymen from either marrying in the case you object to, or admitting to the privileges of the Church in cases where you think privileges should not be given?—I have no objection if that can be done; whether it can be done the Commission must consider."

"21,157. If it could be done, that would void the risk?—Yes, I admit if it could be done in a way to protect ministers of religion."

"21,158. Would your objection to marrying a divorced person who was innocent apply in a case where in a foreign country (a country outside England) a wife had got divorced for adultery alone; would you equally exclude her?—That raises rather the general question on which I should rather, if I may, be excused from giving evidence. I want to confine my evidence to this particular point."

"21,159. But you would cover that case?—I should cover that case, but I wanted not to give evidence on that particular point."

"21,160. No, I am not asking that, my Lord, in the least. Do you know whether in the Scotch Episcopal Church there has ever been a refusal to marry an innocent person who has divorced her husband, or a man who has divorced his wife for desertion?—No, I have not heard it."

"21,161. (*The Archbishop of York.*) With regard to the suggestion made that there might be a protecting clause to protect the conscience of the clergy, does not the further difficulty remain that if there was any protecting clause some clergy might refuse to avail themselves of it, and celebrate marriages of the kind of which you have been thinking?—If it were done to that extent as you suggest, it would be, I am perfectly certain, a very serious evil indeed; I mean so serious, that if some of the clergy were to marry persons who were known to be divorced on grounds which most of us would hold to be invalid, or insufficient for divorce, I am quite certain there would be such a strong feeling in the Church of England—so utterly strong a feeling—that again I say the relations between Church and State would be very much imperilled."

"21,162. So that really the strain would not be removed by merely a protecting clause protecting such clergy who did not see their way to celebrate such marriages?—It would not be an adequate protection."

"21,163. And would you say there was not only the conscience of the clergy to be considered but the consciences of the laity?—Distinctly."

"21,164. And would not you say that a clergyman refusing to celebrate such marriages would give such offence as to make his position in his church very difficult?—Perfectly true; in this Hertfordshire case the clergyman solemnized the marriage, but gave very dire offence to some of his people by doing it."

"21,165. So I may take it that the protecting clause, as you have suggested, would be only some measure, but not an adequate measure, of relief?—Yes, I agree to that."

523. The terms of our Commission do not entitle us to enter into a general inquiry as to the marriage laws in this country, nor into the important and large questions raised by the points indicated by the Bishop of St. Albans as to universal civil marriage and the general position of the Established Church towards questions arising out of the marriage and divorce laws. These matters must be left by us for the consideration of the Legislature.

524. An alteration in the Act of 1857 would, however, appear to be required, if our recommendations as to extending the grounds upon which divorce can be obtained should be adopted. The protecting clauses in that Act would then be inadequate, those clauses being confined in the manner already stated. Acting on the principle upon which those clauses were introduced, it would follow that they would require extension, if the conscientious objections of those who object to divorce altogether, or on any ground other than adultery, are taken into consideration. The extended clauses should apply not only to divorces granted in England, but to those granted abroad.

525. At the same time, whatever protection or measure of liberty may be provided for those who maintain the objections aforesaid, it must be remembered that there are others, both clergy and laity, who do not support them, and we think that freedom of opinion and action should be preserved to them.

The Marriage Laws.

526. An inquiry into these laws and their working is not authorised by the terms of our Commission, but many witnesses have attributed much of the matrimonial troubles, miseries, and misfortunes, which exist, to the present state of these laws, and have incidentally expressed themselves on the need for their improvement on the ground that they permit far too freely of improvident, reckless, and unsuitable marriages, which lead to disastrous results. They point to the power to contract marriage at an age too early; to the need for further and more stringent provisions as to obtaining the consent of parents or guardians to the marriage of minors; to the need for more adequate public notice of intended marriages, and more publicity and formality in marriages before registrars; to the want of any provisions for ensuring the fitness of persons, mentally and physically, to marry, and that they have any adequate means of livelihood; and to other matters which render a marriage unsuitable. Though we are not able to inquire into and make recommendations on this important subject, we have felt that its close connection with the subjects of our inquiry made it impossible to exclude the incidental statements to which we have referred, and that we ought to make this reference to the subject in our Report.

The Effect of the Inquiry.

527. The inquiry is confined to the state of the English law and its administration, but we feel that its effect will be recognised and felt outside this country. We have shown the diversity of law prevailing in the United Kingdom and the British Dominions, as well as the laws of other countries.

We have shown, as we consider, the unsatisfactory state of the law in England and its need of reform. We have endeavoured to recommend reforms which, in our opinion, ought to be the foundation of a reasonable law suitable to real human needs, and, if our recommendations be adopted for England, it may be hoped that in time they may be accepted throughout the Empire and possibly in other countries. The movement for uniformity of law, in certain respects similar to our own recommendations, has already begun in the United States of America; and, in view of the substantial identity of the matrimonial relationship and social position of the family among those nations which are European or of European origin, the hope may be expressed that uniformity of marriage and divorce laws may in the end be achieved among those nations, and that at any rate such uniformity may be reached throughout the British Empire among those subjects of the Crown with whom monogamy prevails.

SUMMARY.

528. The main proposals in this Report may be summarised by presenting in a concise form the substance of the recommendations which deal with the more important points which have been considered. The minor points, many of which deal with procedure and practice and details, need not be here summarised.

Recommendations on the more Important Points.

I.—*Under Part X.*

(1) That the High Court should hold sittings and exercise jurisdiction locally for the purpose of hearing and determining divorce and other matrimonial causes by Commissioners appointed for that purpose.

(2) That the country should be apportioned into districts corresponding with the present circuits of the High Court, subject to such modifications as might prove convenient, and a metropolitan district.

(3) That there should be a Commissioner for each district or combination of districts who should be selected by the Lord Chancellor from among the county court judges or persons qualified to be appointed Commissioners of Assize, with power, if it were found necessary or convenient to have more than one Commissioner for a district, to add another.

(4) That the Commissioner, while in office as such, should have all the powers of a judge of the High Court of Justice and all the jurisdiction of the High Court of Justice in these cases, subject to rules of practice as stated.

(5) That the sittings should be at each place where there is a registry of the High Court, and at such other place or places at which the Lord Chancellor should think sittings may be reasonably required, and that registries should be established at such place or places with the necessary powers.

II.—*Under Part XI.*

(1) That the actual exercise of jurisdiction locally should in practice be confined to cases in which the joint income of the petitioner and the respondent is not more than 300*l.* per annum and the assets not more than 250*l.*

(2) That simplified procedure and practice for these cases as explained in detail should be adopted, special tables of fees and costs fixed, and provisions (as suggested in Part XVI.) made as to proceedings *in formâ pauperis.*

III.—*Under Part XII.*

(1) That the power of Courts of Summary Jurisdiction to make orders having the permanent effect of a decree of judicial separation should be abolished.

(2) That the jurisdiction of Courts of Summary Jurisdiction to grant separation orders and maintenance orders should be preserved, but the exercise of such jurisdiction should be limited, so that orders should only be granted where they are necessary for the reasonable immediate protection of the wife or husband, or the support of the wife and the children with her.

(3) That if it is or becomes necessary for parties to be permanently separated, application for that purpose should be made to the High Court by a simple process.

(4) That jurisdiction under the Licensing Act of 1902 should be maintained, but limited to a period as stated in Part XIII.

IV.—*Under Part XIII.*

That amendments as recommended in Part XIII. be made in the Summary Jurisdiction (Married Women) Act, 1895, and the provisions of the Licensing Act, 1902, relating to separation in cases of habitual drunkenness.

The principal recommendations in the said Part are:—

1. That the grounds upon which orders may be made should be—
   (i) Cruelty by the respondent to the applicant.
   (ii) Habitual drunkenness on the part of the respondent.
   (iii) Wilful desertion by the respondent of the applicant without the consent or against the will of the applicant and without reasonable cause.
   (iv) Neglect by the husband to provide reasonable maintenance for the wife or her infant children whom he is legally liable to maintain.

2. That "cruelty" should be defined as recommended, and should include the acts specified.
3. That "habitual drunkard" should be defined as recommended.
4. That orders on the grounds aforesaid may be applied for by either husband or wife.
5. That the proposals made as to amendments as to the powers of Courts of Summary Jurisdiction and in their procedure and practice, &c., should be adopted, and among these—

(i) That, if a permanent order become necessary, it should be left to the Superior Court to make such order either for judicial separation, or for divorce if the case is one in which there are grounds for divorce and that remedy be claimed.

(ii) That no separation order made by a Court of Summary Jurisdiction should be continued for a period of more than two years from the date of the original order separating the parties.

(iii) That separation orders should not be made in cases of desertion or neglect to maintain, but only maintenance orders.

(iv) That an order for maintenance should be enforceable after seven days.

(v) That the suggestions made as to enforcing payments under deeds of separation and of treating such deeds as ended in certain circumstances should be adopted.

V.—*Under Part XIV.*

That the law should be amended so as to place the two sexes on an equal footing as regards the grounds on which divorce may be obtained.

VI.—*Under Part XV.*

That the law should be amended so as to permit of divorces being obtained on the following grounds:—

1. Adultery;
2. Desertion for three years and upwards;
3. Cruelty;
4. Incurable insanity after five years' confinement;
5. Habitual drunkenness found incurable after three years from first order of separation;
6. Imprisonment under commuted death sentence.

VII.—*Under Part XVI.*

(1) That amendments should be made in the law, procedure, and practice relating to divorce and matrimonial causes as suggested in detail, the more important amendments being:—

1. That British subjects domiciled in England, but resident elsewhere in the Empire, should be permitted, if their cases can be tried in the place of their residence within the British Dominions, to have the decree registered in England; and that the decree, when registered in England, should be operative, as if made in England, if made on grounds permitted by the law of England. (*See* Part XVI., Chapter I., on this subject.)
2. That where the husband and wife are domiciled within the jurisdiction at the time of the commencement of the desertion of the wife, she may maintain a suit, as if the domicil remained what it then was, and that the provisions suggested as to other cases of change of domicil should be adopted.
3. That the court should have jurisdiction to entertain any matrimonial suit by a wife, whose husband has been deported under the provisions of the Aliens Act, which the court would have been able to entertain, if the person so deported were domiciled in England.
4. That whether habitual drunkenness be made a ground for divorce or not, the High Court should have jurisdiction to deal with cases of separation on this ground.
5. That where the courts of any other country, in the exercise of jurisdiction conferred upon them by the law of that country, declare a marriage null,

the English court should be at liberty to pronounce it null also, even though it may have been celebrated in accordance with the law of the place of celebration.

6. That a party should be entitled to obtain, and the court have jurisdiction to pronounce, a decree of nullity in the following cases, as more precisely stated in Part XVI., Chapter I., but for convenience summarised thus :—

(i) Where the other party is of unsound mind at the time of marriage, or in a state of incipient mental unsoundness, which becomes definite within six months after marriage, of which the first party was then ignorant, provided that the suit be instituted within one year of the marriage, and there has been no marital intercourse after discovery of the defect.

(ii) Where the other party is, at the time of the marriage, subject to epilepsy or to recurrent insanity, and such fact is concealed from the first party, who remains ignorant of the fact at the time of the marriage, with a similar proviso to that last mentioned.

(iii) Where the other party, at the time of the marriage, is suffering from a venereal disease in a communicable form, and the fact is not disclosed to the first party, who remains ignorant of the fact at the time of the marriage, with a similar proviso to that aforesaid.

(iv) Where a woman is found to be pregnant at the time of her marriage, her condition being due to intercourse with some man other than her husband, and such condition has not been disclosed by her to her husband, with a similar proviso to that aforesaid.

(2) That a party to a marriage should be entitled to apply to the court for an order of presumption of death, and to obtain an order, and on such order being made absolute, the applicant should be entitled to contract a valid marriage in the two following cases :—

1. Where the other party has been continually absent from the first party for the space of seven years and shall not have been known by such party to be living within that time.
2. Where a party to a marriage, who reasonably supposes the other party to the marriage to be dead, but the fact cannot be definitely ascertained, satisfies the court that there is reasonable ground for declaring the second party to the marriage to be dead.

(3) That amendments be made in the procedure and practice of the court as suggested in detail, the principal amendments being :—

1. That, while adultery be retained as a defence, the court should exercise its discretion to pronounce a decree according to the circumstances of the case.
2. That defences in cases of judicial separation should be on similar footing to those in cases of divorce.
3. That the 5th section of the Act of 1884 (*see* Part V.), which gives immediate rights to proceed for judicial separation or divorce, on non-compliance with a decree for restitution of conjugal rights, should be repealed.
4. That the proviso in section 43 of the Act of 1857, and also that in section 3 of of the Evidence Further Amendment Act, 1869, should be repealed.
5. That the court should make a decree absolute on the application of either party at the expiration of the proper time for the pronouncing thereof (unless there be an intervention in the meantime).
6. That a decree absolute should be unimpeachable after the expiration of five years from the time when it was made.
7. That the court should have power, in its discretion, when a decree of separation is asked for on grounds found by the court which would justify a decree of divorce, to make a decree of divorce on the application of the respondent.
8. That for the right to recover damages against a co-respondent there should be substituted a power to make orders against him or his property as suggested in Part XVI., Chapter III., and that provisions of a similar character should be made with regard to orders against a woman found guilty with a respondent husband.
9. That all divorce and matrimonial causes should be heard before a judge alone.
10. That the suggestion as to costs should be adopted.

11. That provisions as suggested in detail in Part XVI., Chapter III., should be made with regard to proceedings *in formâ pauperis*.
12. That the suggestions as to treating deeds or agreements for separation as at an end, and as to setting such documents aside, be adopted.
13. That we do not recommend any change in the law permitting the inter-marriage of guilty parties.
14. That the suggestion with regard to preventing abuses in connection with Jewish divorces be adopted.

VIII.—*Under Part XVII.*

That the suggestions made by us in Part XVII. with regard to limiting publication of reports of divorce and other matrimonial cases be adopted, those provisions being:—

1. That a judge hearing a case should be expressly empowered by Statute to close the court for the whole or part of a case, if the interests of decency, morality, humanity, or justice so require.
2. That power be given to a judge to order in court, during the conduct of a case or at its conclusion, that portions of the evidence, correspondence, documents, or speeches, which are unsuitable for publication in the interests of decency or morality, must not be reported or published.
3. That there should be no publication of a report of a case till after the case is finished.
4. That publication of pictorial representations, whether produced from photographs, drawings, or otherwise, of parties, witnesses, or others concerned in divorce and matrimonial cases should be prohibited.
5. That any publication, which infringes the provisions made for giving effect to these suggestions, should render the person infringing liable for contempt of court.

IX.—*Under Part XVIII.*

That the protecting clauses in the Act of 1857 with regard to the position of the clergy of the Church of England should be extended, if the further grounds for divorce above recommended be added.

CONSPECTUS.

529. The recommendations, made in this Report and summarised above, may be conveniently grouped under the following heads, which show in general terms what is proposed:—

(1) The decentralization of sittings for the hearing of divorce and matrimonial cases to an extent sufficient to enable persons of limited means to have their cases heard by the High Court locally.
(2) The abolition of the powers of Courts of Summary Jurisdiction to make orders for the permanent separation of married persons and the introduction of amendments with regard to their powers, procedure, and practice.
(3) The placing of men and women on an equal footing with regard to grounds for divorce.
(4) The addition of five grounds for divorce which are generally recognised as in fact putting an end to married life.
(5) The addition of grounds for obtaining decrees of nullity of marriage in certain cases of unfitness for marriage.
(6) The introduction of other amendments of the present law, procedure, and practice in a number of details.
(7) The making of certain provisions with regard to the publication of reports of divorce and matrimonial cases.
(8) The extension of the protecting clauses in the Act of 1857 with regard to the position of the clergy of the Church of England, if the further grounds for divorce above recommended be added.

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530. We desire to express our recognition of the services rendered to the Commission by the Secretary (the Hon. Henry Gorell Barnes) and the Assistant Secretary (J. E. G. de Montmorency, Esq.). The arrangements made by the Secretary for the sittings of the Commissioners and the attendance of the large number of witnesses were most satisfactory, and enabled the proceedings to continue without any inconvenience or waste of time. The assistance of both Secretaries in the preparation of the Report and other matters has been invaluable. The summary of the laws relating to divorce in foreign countries and British Dominions, prepared by the Secretary, has been extremely useful, and the memorandum on the history of the law of divorce prepared by the Assistant Secretary has been of much assistance to us, and we think will prove of general interest.

We also wish to express our thanks to the Clerk to the Commission (Mrs. Billinghurst) for the unremitting attention and care she has shown in the performance of her duties, which have been very onerous. Miss Stewart's careful indexes will facilitate reference to the Evidence and to this Report.

All which we humbly submit for Your Majesty's gracious consideration.

GORELL (*Chairman.*)
FRANCES BALFOUR.
THOMAS BURT.
CHARLES J. GUTHRIE.
FREDERICK TREVES.
H. TINDAL-ATKINSON.*
MAY TENNANT.†
EDGAR BRIERLEY.
J. A. SPENDER.‡

2nd November 1912.

H. GORELL BARNES (*Secretary.*)

* Subject to note on p. 167. † Subject to note on p. 169. ‡ Subject to note on p. 170.

NOTE by His Honour Judge TINDAL ATKINSON.

I fully concur in the suggestion contained in this Report that the court appointed to try divorce cases should be the High Court, in courts presided over by certain county court judges put into commission for such purpose, or, if necessary, other Commissioners travelling through appointed circuits for the trial of matrimonial causes.

I believe that procedure will give the necessary facilities to enable the poorer classes to obtain relief provided the Commissioners hold their sittings in a sufficient number of towns so that the courts are really accessible to and available for these classes in all parts of the country.

In agreeing to this suggestion I am materially influenced by the consideration that it effectually meets the objection made by a considerable number of persons, many of them very influential, who, rightly regarding the marriage contract as being of the most solemn character not only affecting the parties to it but the welfare of the State, are of opinion that questions affecting the dissolution of marriage should be tried and decided in the Supreme Court.

I desire, however, to record my opinion that should the Legislature at any time decide to confer upon the county courts this jurisdiction it will be exercised and justice administered with complete satisfaction. I think many of the eminent witnesses who gave evidence against this jurisdiction being given to the county courts have in their minds the position of these courts 25–40 years ago.

Judge Woodfall declared in his evidence "that the description of the county court "as a poor man's court is erroneous. The county court is a poor man's court inas- "much as the poor man goes where the thing is cheapest, and as the costs are less "than in the High Court persons go there, but the county court has changed in the "last 25 years, and to label it the poor man's court is quite misleading. In the last "25 or 30 years some 130 Acts of Parliament have thrown upon the county court the "most important jurisdiction. Very large and important questions are litigated "there constantly." I entirely agree with this statement of the learned judge.

There is a very strong body of evidence in favour of this jurisdiction being conferred upon the county courts including that of the Right Honourable Sir David Brynmor Jones, K.C., M.P., the late Sir George Lewis, the President of the Law Incorporated Societies, Law Societies from different parts of the country, and many other important witnesses familiar with the present working of the county courts and what those courts are capable of doing.

These courts offer substantial facilities (1) in regard to locality, (2) in that they are worked by registries affording ample scope for administrative proceedings, and (3) the poorer classes are familiar with and know how to obtain access to them.

As regards the danger of collusion and matters in which the King's Proctor might be required to intervene, the Right Honourable Earl of Desart, who acted for a number of years as King's Proctor, said in answer to question 15,906, "I do not think there is "any objection to county courts from the King's Proctor's point of view."

Another objection raised that divorce jurisdiction in the county courts will interfere with and prevent the proper carrying out of the primary work of these courts. I do not think this objection is well founded. Judge Austin of the Bristol Court and Judge Ruegg, who sits at Birmingham, were both of opinion that they could find time for the trial of divorce cases. The business of these two circuits is heavy, and they afford a very good test of whether the county courts generally are capable of disposing of divorce work.

No doubt the present procedure of and the distribution of the work and sittings in the county courts require reform. The County Court Bill now before Parliament contains ample provisions to effect this necessary reform, but even if this Bill fails to become law the bringing of the County Court Bench to its full complement of 60 judges provided by the County Court Act, 1888 (55 being only appointed at present), would enable these courts satisfactorily to dispose of such divorce causes which might be brought in them.

Judge Sir W. Lucius Selfe, who is opposed to divorce jurisdiction being conferred on the county courts, expressed his opinion that the appointment of these five additional judges would be sufficient for the purpose (*see* questions 2373 and 2374). It would, however, only be necessary to resort to this expedient if it were found that divorce jurisdiction, as exercised in the county courts, acted to the prejudice of the general business of these courts.

In my opinion the statement in paragraph 106 of the Report given as a reason why the county courts should not have jurisdiction in divorce cases, viz. : " that the " recovery of small debts . . still forms a considerable part of the work " of the county courts may be misleading. The debts recoverable in the county courts extend to 100*l*. The statement, moreover, may imply that this duty is performed by the judges; this is erroneous. This part of the county court work falls almost exclusively upon the registrars. Only in a very small percentage of the debts sued for is any defence raised, and these cases are taken by the judges unless the parties consent (which they frequently do) to actions for debt not exceeding 2*l*. being disposed of by the registrars.

I entertain a very strong opinion that in cases of urgency as to custody of children arising in divorce proceedings and the enforcement of orders as to custody if the district commissioner is not able to hear the application he might be authorised to empower the county court judge of the district to deal with and determine it subject to a right of appeal.

The district commissioner may not be accessible in cases of urgency, and it is of the utmost importance that children should be removed, as soon as possible, from the influence of an immoral or brutal parent. Lord Mersey, the late President of the Probate and Divorce Division (Qs. 1321–3), referring to the custody of children said " that the county court judges should have power to enforce orders made by the High Court."

I have recommended the delegation being made to a county court judge as the right of custody may be contested and orders made by commissioners may require to be enforced immediately. My opinion is that amongst local tribunals the county court judges are most competent to deal with these matters. The county courts also possess some powers as to the custody of children under the Guardianship of Infants Act, 1886. However, if any substantial reason can be shown why in divorce proceedings the county courts ought not to exercise this jurisdiction I can see no objection to the delegation being made to a justice of the peace.

H. TINDAL-ATKINSON.

Note by Mrs. H. J. Tennant.

I have signed the Majority Report, notwithstanding a very real anxiety as to the effect of increasing the facilities for Divorce, and of enlarging its permissible causes. And I have done so mainly because I believe that Separation Orders, the general alternative offered to Divorce, work badly in working-class homes, and on the whole make for an increase rather than for a diminution of immorality. We have to consider housing conditions and economic circumstances which often do not make for clean or wholesome ways of life, and where the relief offered by Separation is not only inadequate, but positively mischievous.

I do not ignore the fact that to extend the causes of Divorce or increase the facilities for its relief may in certain directions weaken the general regard for the covenant of marriage. But our great objective obviously is to secure as large an opportunity as possible for decent life, and as far as possible to exclude its opposite, limiting as much as we can—to name one definite plain evil—the number of illegitimate children. Where Divorce makes for that objective, on that side lies the balance of good. Where desertion or infidelity or cruelty have imposed an unduly heavy burden upon wife or husband, a situation is created, which in practice results commonly, not in a restriction, but in an increase of infidelity. Accordingly, where the cause is sufficiently grave to demand the relief of Separation, I believe that the alternative of Divorce should be permitted; and I support the recommendation that desertion and cruelty should henceforth each be regarded as sufficient grounds of Divorce. Indeed I feel desertion to be an even greater cause than infidelity—its general concomitant as it happens—since it nullifies and defeats all the purposes of marriage.

I support the recommendation that insanity be made a cause of Divorce, because I feel it to be unlike any other illness or affliction, but I feel that the measure of relief to the sane partner is inadequate if it is applied only where the other is declared to be incurably insane. In my opinion, the wife of the intermittently insane and intermittently released husband demands just that protection which is afforded, automatically, to the wife of the permanently insane husband by the fact of his confinement. In the latter case a woman may not obtain relief under the recommendations made in paragraphs 290–2, until the insane spouse shall have been continuously confined for a period of not less than five years. But at least she is protected in the meanwhile against the calamity of bearing a child for whose sanity and future she could have little hope. The wife of a husband intermittently sane, and in that condition released, has no such protection. This, I am satisfied, is a matter of pressing anxiety to many working women, and I hope relief may be found in amendment of the Lunacy Laws since the only alternatives, Separation or Divorce, though protecting the individual wife would almost certainly add to the number of defective illegitimate children and, incidentally, multiply the burdens of the State.

I am unable to support the recommendation that habitual drunkenness should be a cause of Divorce, even with the safeguards suggested in paragraphs 313-4. I admit the force of the contention that drunkenness may be such, and so frequent, as to make married life intolerable. But where such drunkenness is actually approved dangerous to others its danger is sufficiently met by the recommendation as to cruelty (paragraph 261). I feel this trouble to be one in which the sober partner can and ought to help at the early stages especially, in a very great degree, and that there should be an no incentive, in these stages, to abandon the victim to his or her declension. Considerations of a wider nature demand not so much the alleviation of the sober partner as the salvation of the drunken. The State looses by every man or woman so disabled, and it is to its interest to avert the loss to itself rather than merely to alleviate its incidence to the individual. I venture therefore to indicate that, in my opinion, the State should endeavour, in the first place, to secure the rescue of the incipient drunkard.

I am unable to support the recommendation in paragraph 322, that a commuted death sentence should be a cause of Divorce.

I am unable to support the recommendation (paragraph 392) that the Court should have power, on the application of the respondent, to grant a decree of Divorce where only a decree of Separation is desired. I cannot feel that the guilty person should have any power to impose upon the innocent a remedy against which he or she may have conscientious scruples. And I cannot ignore the possibility that the existence of such a power might deter the innocent person from seeking a relief desirable alike on personal grounds and in the wider interests of the children of the marriage.

MAY TENNANT.

Note by Mr. J. A. Spender.

I desire to submit a few notes adding to or qualifying the Majority Report with which otherwise I am in complete agreement.

(1) *Desertion.*—I am in favour of making the period of desertion as a ground for divorce *two* years instead of *three*, as proposed in the report.

(2) *Imprisonment.*—It does not seem to me worth while to make imprisonment a ground for divorce merely for the sake of meeting the few cases of commuted death-sentences. I am in favour of making all sentences of five years and upwards a ground for divorce.

(3) *Separation.*—In addition to the power which it is proposed to give the Court to make a decree of divorce, on the application of a respondent against whom a decree of separation is asked for, I am in favour of giving such respondent the right, on application to the Court, of having a decree of separation converted into a decree of divorce after the lapse of two years.

(4) *The Publication of Reports.*—In assenting to the proposal that the "inherent jurisdiction," which the Courts now claim, of hearing cases *in camerâ* should be made statutory, I attach the utmost importance to the definition and limitation of this jurisdiction by Statute, that the Courts should not slip into the practice of using it for the convenience of parties who desire to avoid publicity in cases presenting no exceptional features. The recommendation that the Judge should be required to state his ground for closing the Court is, in my view, an essential safeguard, and if the grounds are so defined by Statute that the parties will not desire to have recourse to them unnecessarily, I do not think that any unforeseen extension of this power need be apprehended. In any case, since the doctrine of an "inherent jurisdiction" to close the Court has been set up, and is implied in the present practice of the Court in nullity cases, it is desirable that it should be defined by Statute.

I wish to add, however, that in any dealing with this subject it will be incumbent on the Legislature to take careful steps to guard the interests of the parties, which seem to me to be seriously threatened by the decision given in the Court of Appeal (July 6, 1912) in the case of Morgan *v.* Scott. In that case it was decided by a majority of four Judges to two that a lady who had obtained a transcript of the shorthand-writer's notes of a case heard *in camerâ* and forwarded it to members of her family was guilty of contempt of Court. In dissenting from this judgment, Lord Justice Fletcher Moulton described it as "a serious encroachment upon personal liberty," and energetically protested against the claim of the Court to "control the personal "acts of litigants after the conclusion of the suit, except to enforce the relief granted." Apart from the important legal principle here at issue, it seems to me clear that, as the Lord Justice contends, the most serious injustice may be done to the parties, if at the conclusion of a case heard *in camerâ* they are to be denied access to the records of the Court or prevented from communicating them to friends, relations, and others, whose good opinion may be of importance to them. It is, therefore, in my view, of the highest importance that the Legislature should take care that restrictions on publicity, which may be deemed necessary in the interests of public decency, are not liable to be interpreted as a rule of secrecy which may be imposed on the parties by the Court, when the proceedings are over.

The Judgment in this case was delivered too late for its consideration by the Commissioners as a whole, and it may yet be reversed on appeal to the House of Lords; but it raises a question of such obvious relevance to a portion of our report that I feel it necessary to add this note, in case the assumption holds that the law is what the Court of Appeal has decided it to be.

As regards publicity in general, I rely on the recommendation that there should be no reports in the public press, until a case is concluded, to correct the chief part of the abuses alleged against reporting, as at present practised. This, I hope, will discourage long and detailed reports running, like a serial story, from day to day, with the accompanying bills, headlines, and sensational incidents. On the other hand, all that is valuable in publicity will remain unimpaired, and the public supervision of the Courts which will be more and not less important if the recommendations made by the majority of the Commissioners are adopted, will continue as hitherto.

J. A. SPENDER.

MINORITY REPORT

BY

His Grace THE LORD ARCHBISHOP OF YORK,
Sir WILLIAM R. ANSON, Bart., M.P., and
Sir LEWIS T. DIBDIN, D.C.L.

His late Majesty King Edward VII. having been pleased to issue a Commission directing certain persons (including us the undersigned Commissioners) to inquire into the present state of the law and the administration thereof in Divorce and Matrimonial Causes, and Applications for Separation Orders, especially with regard to the position of the poorer classes in relation thereto, and the subject of the publication of reports of such causes and applications, and to report whether any and what amendments should be made in such law, or the administration thereof, or with regard to the publication of such reports, and Your Majesty having been pleased to issue a Warrant under Your Majesty's Royal Sign Manual, by which, notwithstanding the late demise of the Crown, Your Majesty authorised the members of the said Commission to continue their labours, and did thereby in every essential particular ratify and confirm the terms of the said Commission, we have inquired into the said subjects, and now humbly present our Report to Your Majesty.

We regret that as we do not concur in the most important of the recommendations made by our colleagues we are unable to sign the Report presented by them, although we are glad to find ourselves in agreement with many of its contents on other matters.

Marriage and the Marriage Contract.

In dealing with the very important subjects committed to our consideration it is well to remember that we use the word "marriage" to denote sometimes the married state, and sometimes the act of being married. In the former sense it means the condition resulting from the relation between husband and wife. In England this relation is recognised by law to be monogamous, so that the special rights and duties of each spouse with regard to the other are shared by no one else; and, further, the law contemplates that it will be life-long, that is to say, will normally endure during the joint lives of the parties. In its other sense, of the act by which the status of marriage is acquired, marriage is the making of a contract by which a man and woman consent to become, then and there, husband and wife. The essence of the marriage contract is this consent, but in England it can only be validly given by persons qualified by law to marry each other, and the contract must be entered into under certain prescribed conditions of prior notice, publicity, and official sanction. Marriages in England must either be celebrated according to the rites of the Church of England, or they must be celebrated in accordance with the Civil Marriage Acts which provide machinery under which Nonconformist as well as purely civil marriages are celebrated. The special arrangements long authorised by law for Quaker and Jewish marriages are safeguarded by these Acts and may be passed over. About 61 per cent. of marriages in England are solemnised in Church. In all these cases the promise publicly made by each of the spouses to the other is: "I take thee "to be my wedded wife [or husband] to have and to hold from this day forward for "better for worse, for richer for poorer, in sickness and in health, to love [and to] "cherish [and to obey] till death us do part." In other words, they promise to maintain the marriage relation during their joint lives, notwithstanding the vicissitudes of health, fortune, and other circumstances. In a marriage under the Civil Marriage Acts the corresponding undertaking is put more briefly thus: "I do take "thee to be my wife [or husband]." It may, we think, be safely assumed that the latter form is not intended to denote any less far-reaching acknowledgment of reciprocal obligation than the former expresses in terms. It is rather that the very words "husband" and "wife" stand for all the rest. It should be added that purely civil marriages, without any religious ceremony, amount to about 20·5 per cent. only of the total number of marriages in a year.

72nd Annual Report of Registrar-General (1909), published 1911 (Cd. 5485), p. xxiv.

Idem.

The State is sometimes called the third party to the marriage contract because it not only lays down the conditions which must be satisfied both as to personal qualifications, and as to the incidents of the contract, but it also gives to the union of those who have been legally married special and definite recognition. The State protects family life, it defines and defends the authority of parents over their children, the rights of children to the care of their parents, and to a certain limited extent the obligations of husband and wife towards each other. But apart from any share which the State can claim in a marriage contract by reason of what it confers, it has a concern of its own in the peace of the community, the welfare of the family, the rearing of healthy children, and the training of good citizens, which renders it imperative that the making and the breaking of marriage contracts should be treated as matters of public importance touching the commonwealth itself, and not as merely private transactions only affecting the parties. The permanence of the nuptial tie is all but universally admitted to be of advantage to the State. "The preservation "of that union, so long as it can be secured, is manifestly essential to the best "interests of society." The "advantage to the State" and "the interests of society" are thus brought into emphatic prominence at the outset of this Report because they indicate what, in our opinion, is the only correct point of view from which a Royal Commission can regard the subject of Divorce. In any discussion upon marriage and the dissolution of marriage it is natural that much should be heard of what is called the ecclesiastical view. The great extent to which during many centuries the Christian States of the West left these matters to be dealt with by the Church and its Courts renders this inevitable. But the meaning of this condition of things must not be misunderstood. The Church of England does not, and never did, claim that non-Christians are subject to its own rules as to marriage and its dissolution, although the State might, and in the matter of Divorce did, adopt ecclesiastical rules and enforce their observance on all subjects indiscriminately. The State definitely abandoned this attitude when it passed the Divorce Act of 1857, by which a new law of Divorce was created to be administered not in the Church Courts, but in a new civil court set up by the Statute. Under that Act adultery, and adultery alone, was made a ground for dissolution of marriage. This offence was said to be "so gross a violation of the marriage contract and so utter a destruction of all the "objects for which the contract was made" as to justify its being so treated. Whatever opinion may be entertained of its adequacy as a reason for divorce, we believe it is true to say that the conscience of mankind has always recognised adultery, as a matrimonial offence, to stand alone in the finality of its effect. Adultery breaks the tie of married life in a sense and with a completeness which can be predicated of no other wrongdoing. For the peculiarity of adultery is that it is a wilful and deliberate transfer to another person of all that is involved in the physical union of husband and wife, which has universally been regarded as the completion and consummation of marriage. The question submitted to the present Royal Commission is, in effect, whether the Statute law made by Parliament in 1857 needs reconsideration either as to the grounds of divorce, or as to courts. The nation more emphatically than in 1857 now includes persons of every variety of creed and of no creed, all of whom have a right to be considered by Parliament in any amendment of the English Divorce Law, and it seems to us to follow that in framing our Report we are bound to treat the question on the broad grounds of the real interests of the whole community and with reference to the actual conditions of our day. We do not therefore express an opinion as to whether the action of the Legislature in 1857 was wise or unwise or as to whether the welfare of the nation has been promoted by the Divorce statute of that year. The repeal of the existing Divorce Acts, even if desirable, is not practicable. It is in entire agreement with this view that, while we do not pretend that non-Christian marriages are necessarily governed by the rules of the Christian society made for Christian marriages, we should claim from that great portion of the nation which professes allegiance to the Christian Faith a due regard for our Lord's teaching as representing what in His view is best for the world.

First Report of Royal Commission on Divorce (1853), p. 4.

Idem, p. 16.

What then is for the public good in England with regard to divorce? Is it in the true interests of the nation that the present law under which marriage once validly contracted is, except for adultery, indissoluble should be abandoned? Very early in our inquiry it became evident that true answers to these questions cannot be given without due appreciation of many different matters, some making for and some against change. It is only on a balance of these conflicting considerations that we can hope to reach a right conclusion.

The Lessons of Experience.

The Dominions. France. The United States.

It is reasonable in the first instance to ask what the experience of other countries can teach us. In the Roman Empire there grew up a system of easy divorce, dreaded by statesmen, but, once established, found impossible to check. As to its result we are told that "throughout the Roman world there can be no doubt that this dissolution "of those bonds which unite the family was the corroding plague of Roman society." To come to our own day, it cannot be denied that during the last half century there has been almost throughout the civilised world an enlargement of the law of Divorce, and a multiplication of the grounds for dissolution of marriage. Most European countries, the great colonial dependencies in Australia, New Zealand, and South Africa, and the United States of America have to a greater or less extent provided legal facilities for dissolving marriage on the grounds which have commended themselves to the majority of our colleagues, viz., desertion, cruelty, insanity, drunkenness, and conviction for crime. The result has been so marked an increase in the number of divorces as to cause, at any rate in some countries, grave apprehension and alarm. Thus in France, since 1884, Divorce may be obtained on the ground of adultery, violence endangering life, cruelty, penal servitude, or grave indignities—the last ground being of elastic definition, including desertion and habitual drunkenness. The growth of divorce under this state of the law has been such that between 1886 and 1906 the number of Divorce Decrees has increased from 2,950 to 10,573 per annum. Since 1906 the number has probably further increased. A witness, M. Henri Mesnil, an eminent French avocat, and a Doctor of Law, informed us that the great increase in the number of divorces was beginning to cause anxiety to the French Government, and that it has generally been thought that divorce was granted too easily. He was disposed to attribute this increase to the vagueness of the term "grave indignities," which admits of extension of the grounds of divorce at the discretion of the judges dealing with these cases.

Milman's History of Latin Xiv, vol ii., p. 22 (ed. 1883).

See post.

Special Report, U.S.A. Government, Marriage and Divorce, vol. ii., p. 357.

Mesnil, 42,968 42,985, 42,987, 43,018.

In the United States of America the excessive prevalence of divorce is notorious, but the actual facts are not perhaps so well known in England as they ought to be. Marriages were dissolved in America by quasi-legislative Acts before the Declaration of Independence. Divorce laws began to be made immediately after that event, with the result that causes of divorce multiplied and divorce by judicial process was systematised. The main grounds of divorce existing to-day have been in operation for a long time. Indeed, the tendency during the last 20 years has been, on the whole, to restrict rather than to extend facilities for divorce. Each of the 50 States and Territories has its own Divorce Law, with the one exception of South Carolina, which, after a few years' experience of its effects, abolished divorce in 1878, with the result, according to the evidence before the Commission, that conjugal fidelity is greater and desertion less frequent in South Carolina than in other States. The opinion of those on the spot, elicited by inquiry for the information of the Commission, was as follows: "We are satisfied that the inhabitants of South Carolina, generally "speaking, are satisfied with the law on Divorce in this state as it now stands, and "that at the present time it could not be repealed." With regard to the other 49 States and Territories, adultery is a ground of divorce everywhere, and desertion and cruelty in varying forms almost everywhere. In 40 States habitual drunkenness, and in 41 States conviction of grave crime are grounds of divorce. In only five or six States incurable insanity appears to be now admitted as a ground. It formerly prevailed much more widely, but has been abrogated in many States. In addition to these six causes which it is the desire of those who have signed the Majority Report to see adopted in England, neglect to provide for the family is a good cause of divorce of the husband by the wife in many States, and special grounds, *e.g.*, vagrancy, intolerable indignity, attempted murder of a spouse, and joining a religious sect which prohibits the marriage relation are added here and there. Contrary to a widespread impression in England, no State allows divorce for incompatibility except the Western State of Washington, where divorce may be granted whenever the judge is satisfied that for any cause the parties can no longer live together. The most frequent ground for divorce in the United States is said to be desertion. A few years ago, at the suggestion of President Roosevelt, a Divorce Congress composed of Delegates from 40 States was convened. After full discussion the Congress in 1906 agreed to a "uniform Divorce Law," which was recommended to the various States and Territories for adoption by each separately. It would seem that this remarkable

Crane, 16,344.

Crane, 16,319.
Crane, 16,326.

Address, Resolution, Uniform Law adopted by National Congress on Uniform Divorce Law.

movement is likely to have great and permanent results. The Uniform Divorce Law would practically reduce the grounds of divorce to the six causes above mentioned, with the exception of lunacy, which is definitely omitted. It also deals with the general subject of the jurisdiction of the Courts of a State to grant Divorce Decrees, and with the closely allied subject of the recognition to be given in one State to decrees obtained in another.

Address, p. 12.

The Congress appended to their proposals an Address which contains these significant words: "It is fully realised that the new law proposed is not a complete "or ideal uniform divorce law, but that it is only the best law in that direction which "it now seems practicable to obtain." In other words, the Congress was confronted by the almost insuperable difficulty of the withdrawal of licence once given, the retracing of steps once taken in the direction of an early dissolution of the marriage tie.

The general position, therefore, in the United States is that for many years past there has been in operation a system not very unlike—so far as grounds of divorce are concerned—that which the Report of the majority would impose on England, that experience of its working has produced a marked and growing desire for restriction and limitation, but that to give practical effect to this desire is found exceedingly hard in the face of the laxity to which the nation has become used.

When we turn from the Divorce Law of America to consider what has been the result of its working, we are confronted by a state of things so grave and menacing that we cannot be surprised at the terms in which it is described by those who know most about it. Mr. Roosevelt states as "one of the most unpleasant and dangerous "features of our American life" "the loosening of the marital tie among old native "American families." It appears from the United States Government statistics that whereas in 1867 there were 9,937 divorces, in 1900 there were 55,751, the rate having risen from 27 per 100,000 population to 73 (or omitting limited divorce, 72). To realise the magnitude of this rate it should be borne in mind that the corresponding rate in England and Wales for 1900 was 2 per 100,000 population. By 1906 the number of divorces in the United States had risen to 72,062, and the rate per 100,000 to 86. Divorces are, as might be expected, not evenly distributed over the United States. The rate is highest in the Western and lowest in the Atlantic States. The growth of divorce in the country as a whole has continued since 1906, and is still proceeding. It is said: "The divorce rate, like the velocity of a falling body, is "constantly increasing." The Census Report states: "The enormous increase in "divorce revealed by these statistics naturally raises the question how far this "increase is to be attributed to growth in population. . . . . The rate of "increase in divorce is far greater than the rate of increase in population."

Census Report, p. 4.

Census Report, p. 19.

Census Report, p. 67.

Idem, pp. 12, 13.

The outstanding fact is that in the case of the great English-speaking American people, which has, and for many years has had, a Divorce Law largely similar to that which our colleagues would see established in this country, the number of divorces has grown rapidly year by year. It has reached a figure which, in proportion to population, is now considerably more than double that of the number of divorces in any other country of the world except Japan (where one in every six marriages is dissolved). Witnesses have given their own views of the causes of this ominous development. It is said, no doubt with justice, that the number and varying capacity of the judges who exercise divorce jurisdiction in the States tends to render divorce too easy. It is brought to "every man's door," and the subject is not regarded seriously enough. Another cause is said to be the lightness and frivolity with which marriage is treated. It is obvious that the multiplication of facilities for dissolving an unsuccessful marriage will not tend to diminish the recklessness with which marriage is contracted. This was well put by an American witness whose general point of view was favourable to divorce as a necessary evil. He admitted that "there would probably be in the "minds of some persons a cheapening effect upon marriage if they calculated that "in the act of marriage, or in the contracting of a union, there would be possibly "some way out of it."

Census Report, p. 485.

Crane, 16,326, 16,435–8.

Crane, 16,365.

Crane, 16,432.

So marked has been the decay of home life and family ties in modern times in America that a "National League for the Protection of the Family" was formed about 30 years ago, the special aim of which is "the improvement of public "sentiment and legislation, to protect the institution of the family, especially as "affected by existing evils relating to marriage and divorce." The corresponding secretary of the league, Dr. Samuel Dike, whose unique knowledge of the subject cannot be questioned, writes as follows: "However humane in intent divorce may be, "whatever perils of incontinence without it, we find no historical ground for the

Report for 1910.

Report of the Committee on the Family, p. 9.

" contention that easy divorce has increased social purity or happiness, but that rest-
" lessness, sexual laxity, temptation to other attachments, corruption of home atmo-
" sphere, and selfishness instead of public well-being cause or accompany this social
" peril."

The impression at one time common, that the deplorable frequency of divorce in America was largely the result of the independence of each other of the various States, and the ease with which immigrants coming either from other States, or from Europe, could avail themselves of the facile system of a particular State, has turned out to be ill-founded. The Census Report, after giving statistics, states: " Although " these figures do not prove that no persons migrate for the sake of obtaining a " divorce, yet they show that migrating for that purpose is by no means the usual " and ordinary practice." Dr. Samuel Dike says that the Report " has shown that " migration for easy divorce is confined within very small limits both as to numbers " granted and the places where such divorces are obtained."

Census Report, p. 34.
Barratt, 16,575–9, 16,592.
Lawson, 23,834–6.
Report for 1909 of National League, p. 8.

After making all allowances for differences of national temperament, climate, and circumstances between England and the United States, we are bound to recognise that the two countries have too much in common to make it probable that if we in England adopt what are substantially the American grounds for divorce, we shall escape the grave disasters which have admittedly followed their adoption in the United States. The unwisdom of neglecting so conspicuous an object lesson is emphasised by the fact, which apparently is admitted on all hands, that now that the present American Divorce Law has had time to take root and bear its inevitable fruit, no mere legislative restrictions, even if practicable, will stem the tide of divorce. The slight improvements of late years in American Divorce Law, to which we have already referred, " have been less on the legal grounds for divorce than on restrictions " on their abuse." Dr. Dike, commenting on the Census Report, says: it " seems to " make it fairly clear that legal restrictions, though reducing other evils, have less " effect in lessening the number of divorces than many hoped. In some instances " such restrictions seem to reduce the divorce rate for three or four years, and then " divorces apparently return to nearly or quite their old rate of increase." It may be, as was insisted by one witness, that divorce is growing, not only in America, but almost all over the world, and that this development is indicative of some widespread social movement existing behind the divorce laws of the various countries which have made them. But that view of the inevitableness of divorce extension, however impressive it may sound, has no force with regard to England, except so far as public opinion in this country can be shown to favour divorce extension. For it is public opinion, and not fate, which will decide. We shall deal with the question of a general demand in England for greater facilities for divorce presently. Meanwhile, it is irrelevant to the purpose for which we have examined the precedent of the United States. We are considering not what is inevitable, but what is advisable. With that aim before us we cannot but be profoundly influenced by the example of America governed by Divorce Laws the working of which has, as a matter of fact, been followed by a state of things regarded by most Americans with profound regret and alarm, but an effective improvement of which no one discerns how to effect.

Special issue of the National League for 1909 (No. 11), p. 17.
National League Report, 1909, p. 9.
Barratt, 16,714, 16,821.

It would serve no useful purpose to describe in this Report all the various Divorce Laws of foreign countries and British colonies. Full information as to them is given or referred to in the evidence. But in view of the extension of grounds of divorce in most parts of the world, it is significant that no witness has been able to tell us of a country where, as the result of greater facilities for the dissolution of marriage, public morality has been promoted, the ties of family, of husband and wife, of parents and children have been strengthened and home life has been made purer and more settled. The experience of other countries, and especially of America, certainly does not encourage the hope that the public good of this nation will be promoted by the enactment of extended grounds of divorce.

Barnes, 3–6 and analysis, vol. I, p. 4–10, 34,943–4 41,352, and Appendix XXII.
Bluebooks: No. 2 (1894), C. 7391; No. 2 (1903), C. 1468.
H.C., 144, 145 (June 1894).
H.C. 323, 324 (August 1894).
Cd. 1785 (October 1903).
Cd. 5993 (December 1911).
U.S.A. Census Report, vol. ii. pp. 264–390.

The English Demand for extended Grounds of Divorce.

It is necessary next to examine the reality and the strength of the alleged demand for the adoption of additional causes of divorce. It cannot be questioned that in a democratic country like ours public opinion must prevail; so that if it no longer supports the present comparative strictness of the marriage law and demands its abrogation, the State is bound to comply with that demand. Further, the State must take into account the actual facts of social life and shape its policy accordingly. If, therefore, it were proved that the restriction of the existing law of divorce was

responsible for widespread immorality, which the introduction of additional grounds of divorce would remedy, the State would have strong reasons for making that change.

The additional causes for divorce which have approved themselves to the majority of the Commissioners are (i) desertion for three years, (ii) incurable insanity after five years, (iii) penal servitude for life where there has been a death sentence commuted, (iv) cruelty, and (v) habitual drunkenness. The mass of the evidence given before the Commission and the variety of topics dealt with by the witnesses are so great that the outcome on any particular point is not always easy to grasp distinctly and separately. The danger is of acquiring nothing except a general impression made by the evidence vaguely regarded as a whole. Further, we must always be on our guard lest the sympathy which cases of individual hardship naturally and rightly arouse should tend to narrow our outlook and prevent a comprehensive view of the whole situation as it affects the welfare of the community. The expression "further "facilities for divorce" denotes two quite different things, both of which are dealt with by the witnesses, viz., easier means of using the present law of divorce, and an alteration of the law by the addition of fresh grounds of divorce. The one relates to cheaper procedure and more numerous and different courts, and will be considered at a later stage of this Report. The other is the matter before us at the moment.

Atkinson, 7084.
Halkett, 7309–13, 7174, 7181.
Neville, 6898, 6915.
Smith, 7608.
Goldstone, 20,860–1.
Barnett, 19,224, 19,225, 19,235–7, 19,134.
Bladen, 18,135–8.
Fitzsimmons, 19,466.
Holmes, Charles, 18,361–2, 18,408–11, 18,451–3.
Holmes, Robert, 17,986, 18,007.
Lewis, 19,872–5.
Lightfoot, 18,505, 18,506, 18,515, 18,516.
Massey, 19,408–11.
Mundin, 18,778–85, 18,790.
Palin, 18,198, 18,200, 18,205.
Pike, 18,617, 18,622–4.
Wright, 19,326.

The evidence, so far from showing any great or general demand on the part of the poorer classes for divorce on other grounds besides that of misconduct, very clearly proves the absence of any such demand. Most of the witnesses actually in contact with the poor, with practical knowledge of their affairs, are emphatic upon this point. Stipendiary police magistrates at Leeds, Hull, South Staffordshire, and Grimsby deny any real demand, and, more significant still, those, *e.g.*, the magistrates at East Ham, Tower Bridge, Bow Street, and Birmingham, who are personally in favour of some extension of the divorce law, do not assert that the people desire it. Police court missionaries from a great number of centres in London and the Provinces almost without exception testified either that there was no demand, or that it was of very limited extent. Mr. Parr (*a*), the Director of the National Society for the Prevention of Cruelty to Children, although in favour of enlargement of the grounds of divorce, admitted that even in his great experience he did not meet with a large number of applications for divorce. Mr. Silcock (*b*), the Chairman of the Council of Associated Societies for the Protection of Children, stated that there was no demand. Mrs. Evelyn Hubbard (*c*) and Mrs. Steinthal (*d*), representing the "Mothers' Union," produced a remarkable body of evidence. The Mothers' Union consists of 278,500 wives and mothers almost entirely of the working classes in England and Wales. The number of members, including those in Scotland, Ireland, and the colonies, is much larger. Any general demand by the poor for wider powers of divorce could not but be known to the members of such an organisation, and considering the vast dimensions of the union, the demand, if it existed, might reasonably be expected to make itself unmistakably audible. But on the contrary a number of meetings of branches of the Union have been held in different places at which resolutions hostile to any extension of the grounds of divorce have been passed unanimously or by great majorities. An aggregate of 85,491 votes of working mothers have been recorded. Reports from officials of the Union and of others working amongst the very poor were asked for, in answer to the question whether, if divorce were granted in cases of desertion, permanent lunacy, and long sentences of penal servitude, it would tend to lessen the sense of the binding character of the marriage tie amongst the poor. The great majority of those applied to replied in the affirmative, a few in the negative, and some considered that respect for the marriage tie scarcely existed amongst the very lowest class, and therefore could not be lessened. The Church of England Men's Society, numbering 100,000 members, 70 per cent. of whom are working men, sent up petitions signed by more than 15,000 men protesting against an extension of grounds of divorce and an even greater number desired the repeal of the Divorce Act of 1857. The evidence of clergymen of large working-class parishes is scanty, but, such as it is, it confirms that of the other witnesses.(*e*)

(*a*)Parr, 36,606–8.
(*b*)Silcock, 22,287–90.
(*c*)Hubbard, 16,886–91, 17,052–4.
(*d*)Steinthal, 17,066, 17,071–84, 17,089, 17,096, 17,105, 17,131.
Savile, 39,556–9.
(*e*)Jones, 20,932, 20,972–6.
Ditchfield, 20,165–6.
Church, 17,139–47, 17,169–70.

We infer from questions asked of some witnesses by the Chairman and some of our colleagues that opinions such as those reported by the representatives of the Mothers' Union are deemed of little value because some of those who collected those expressions of opinion themselves believe that marriage is indissoluble even on the ground of adultery. In the absence of any indication of a desire on the part of

these witnesses to deceive, or to convey an untruthful impression, we do not regard it as reasonable thus to dismiss as of no account so great a body of first-hand evidence. No doubt strong personal convictions affect a witness even unconsciously, and must be taken into account in weighing his or her evidence; but to discard such evidence as valueless would be unsafe; while it would be most unfair to regard the personal prepossessions of a witness as affecting the truthfulness of written statements given by other persons as the result of their experience and intimate personal knowledge.

On the other hand, evidence was produced before the Commission tending in an opposite direction which deserves attention. If personal bias were sufficient to put witnesses out of court, it might be thought to have an influence in the case of witnesses such as Miss Llewelyn Davies, the Secretary of the Women's Co-operative Guild, and Mrs. Barton, the wife of the Secretary of the Independent Labour Party at Sheffield, who advocated a facility of divorce hitherto unheard of in any civilised country. But in their case, too, while due allowance must be made for very evident and very strong prepossessions, the evidence must be reckoned with seriously.

Miss Davies attended as a representative of her guild, consisting of 520 branches and 25,897 members, nearly all "happily married" women of the working class. Davies, 36,965–6.
431 of these branches with 23,501 members were invited to express an opinion Davies, 36,975,
(*a*) as to equality of treatment of the sexes in the matter of divorce, and (*b*) as to 36,991.
cheap divorces, and by a great majority they declared in favour of both. At an
annual congress of members, held at Oxford in July 1910, attended by 680 delegates, Davies, 36,983–8.
the same questions were answered in the same way. No questions as to the
desirability of further grounds of divorce were submitted to either of these bodies,
because it was not thought "they had yet had sufficient study of the subject." But Davies, 37,059.
for the purpose of this Commission Miss Davies obtained the views of 124 individual
women whom she considered "especially intelligent," and who were members of a Davies, 36,974,
much more numerous class of past or present officials of the guild. 91 out of the 37,054–7.
124 were in favour of refusal to maintain wife and family being a ground of divorce. Davies, 36,993.
Of the 124, 98 thought insanity, 100 cruelty, 88 desertion for two years, and 75 a
separation order lasting three years should be grounds of divorce. Only 40 women Davies, 36,994–6.
were asked as to drunkenness, and of these 26 were in favour of its being a ground
for divorce. 82 of the 124 considered that "mutual consent" should be a ground.
As one of them put it: "This is the most reasonable ground for granting divorce." Davies, 36,998.
75 were of opinion that "serious incompatibility" was a proper cause for divorce.
Miss Davies explained that by "serious incompatibility" was meant "a serious Davies, 37,048–
"desire on the part of either of the parties not to live with the other," and that 51.
divorce ought to be "possible" although one partner (say the wife) does not wish
to separate, and although the desire of the husband to be freed is prompted by the
fact that he has transferred his affections to another woman. 86 out of the 124
women consulted considered that divorce should be allowed where both parties are
guilty. In fact, as one of the members put it: "more reason than ever." Davies, 36,998.

Miss Davies' evidence was supplemented by Mrs. Barton, who, on behalf of the
Sheffield branch of the guild, expressed strong views as to incompatibility. Barton, 37,115.
"Wherever there are two people joined together, and they find their whole interests
"are quite opposed to each other . . . . that should be a ground for divorce." She
instanced the case of a woman who was unwilling to bear children as one in which Barton, 37,109,
she ought to be entitled to claim a divorce, although the husband had committed no 37,147–50.
offence of any kind.

It is impossible to separate one portion of Miss Davies' and Mrs. Barton's evidence from the rest, and regarded as a whole it supports a view of the marriage contract and its dissolution which we believe would be generally rejected. At any rate it does not seem reasonable that we should be asked to accept as evidence of a great public demand the extreme opinions of a comparatively few individuals selected by a witness who shares those opinions.

The Commission has heard the evidence of a large number of witnesses with regard to separation orders granted by magistrates under the Summary Jurisdiction (Married Women) Act, 1895, and the Licensing Act, 1902. Its importance is very great upon the question we are now considering of the existence of a great public demand for enlarged grounds of divorce. These orders are obtained in cases of cruelty, neglect to maintain, and habitual drunkenness, against a husband, and in cases of habitual drunkenness only against a wife. The magistrate can make an order for maintenance or for separation or for both. Until the matter was dealt with Harriman *v.* Harriman (1909) P. 123.
by the Court of Appeal in a recent case, it was customary to include separation in all

Dodd *v.* Dodd (1906), P. 189

maintenance orders. The result was that a multitude of orders were made which were treated as equivalent to decrees of judicial separation, although they were in fact merely cases of a husband probably decamping, and certainly neglecting to maintain his wife and children, the object of the applicant in these cases being rather to enforce the husband's discharge of his duties than to terminate the marriage. There can be no doubt that this unfortunate practice of needlessly multiplying separation orders led to an exaggerated estimate of the real condition of things in England. Thus in the Civil Judicial Statistics for 1908, edited by Sir John Macdonell, C.B., he gives in a tabular form the number for each year of (*a*) Decrees of Divorce, (*b*) Decrees of Judicial Separation, (*c*) Separation Orders, adds them together, and, having thus obtained a very large total, observes : " In no other country, so far as " I know, are so many separations." It was commonly stated, on the strength of these statistics, that by means of separation orders a huge number of life-long divorces, without the possibility of re-marriage, had come into existence and was growing at the rate of 7,000 fresh cases every year. Sir John Macdonell indeed presented this view to the Commission : " A state of permanent separation is likely " to be unfavourable to morality ; and it seems to me a great evil that thousands of " married couples are by magistrates' orders placed in this position. The figures run " into thousands. (*Chairman.*) It is over 7,000 ?—(*A.*) It is over 7,000. It cannot " be right that men and women of 20 or 21 years of age should be separated for life " and be debarred from marrying." But the evidence has shown that happily this view is erroneous. In the first place, through a mistake for which the compilers of the statistics are not responsible, the number given of separation orders was too high. Secondly, the number of such orders is dropping very largely year by year. In 1907 it was 7,007 ; in 1908, 6,986 ; in 1909, 5,227 ; and in 1910, 4,539. This drop is due to an abandonment in many police courts of the objectionable practice of making an order for separation where only one for maintenance is necessary. Even now it is clear from the evidence that a vast number of needless separation orders are made either because the point is not appreciated, or because, as at Sunderland, the local magistrates prefer to adhere to their old practice. Many witnesses with special knowledge, *e.g.*, magistrates, clerks to justices and solicitors, told us that separation orders were often granted far too readily. In one London court the presence of a particular stipendiary almost doubled the number of orders, because he entertained a " chivalrous view." It is, of course, the fact that in almost all cases where a maintenance order (without separation) is made the husband has temporarily or permanently abandoned his family, so that for the moment, at any rate, there is a *de facto* separation. How these cases at the present day compare in point of number with those of a similar type in former times, or in other countries, we have no means of judging. Considering the endless variety of circumstances which attend such cases, especially as to the completeness and duration of the desertion, it would be absurd to treat them as in the mass indicating a demand for divorce.

Civil Judicial Statistics, 1908, p. 17.

Lord Gorell's speech in H.L., Hansard, 5th series, vol. 2, p. 481.
Macdonell, 392, 393.

Stringer, 23,386–429.
Civil Judicial Statistics (1909), p. 19.
Stringer, 23,402.

Barker, 10,791–8.
Halkett, 7252.
Garratt, 12,950.
Barradale, 8774.
Byrne, 9,672.
Cobbett, 10,052.
Willey, 10,218–25.
Holmes, Thos., 17,722.
Rose, 2138–40.

But the decisive reason why the attempt to class separation orders with decrees for divorce and permanent judicial separation is misconceived is that the former are not in fact permanent at all. They come to an end *ipso facto* whenever the parties choose to re-unite, and the evidence has made it overwhelmingly clear that these orders in most cases remain in effective force for a short time only. A very large proportion of the applicants do not appear on the day appointed for the hearing of their summons. A great many orders which have been made are never taken up by the applicants and remain unused in the magistrate's clerk's office. There are said to be 4,000 such orders at Leeds alone. Making very full allowance for cases where poverty or the uselessness of seeking to serve the order on the decamped husband, and not indifference or a change of mind, is the cause, it is impossible so to account for the whole of these abandoned orders. Finally, in the remaining cases where an order has been made and acted on, the parties come together again in a great proportion, probably a great majority, of the cases. The witnesses all agreed in the fact, though the actual proportion evidently varies in different localities. Some estimated reconciliations as highly as 70 or 80 per cent. of the cases, some as low as 15 per cent. ; but most put it at above 50 per cent. The number of orders actually in operation at any given time is probably a mere fraction of those made during the preceding year. It was said that often the parties come together, not because they are really reconciled, but because of the economic pressure caused by the attempt to support separate establishments. Doubtless it is so in some cases ; but, on the other hand, the evidence of the police court missionaries, who on this point are the best

Willey, 10,407.
Marsham, 1782.
Neville, 6860, 6861.
Brown, 7573.
Dingle, 7962, 8065, 8066.
Roberts, 8133-7, 8268, 8710-19.
Barradale, 8792, 8803.
Sanders, 9007, 9008, 9100 9101.
Barker, 10,790, 10,804.
Peacock, 9198.
Byrne, 9644.
Sowerby, 9779-81.
Willey, 10,408.
Baker, 10,755-4.
Payne, 11,158.
Simpson, 11,335.
Lloyd, 12,423.
Wansbrough, 17,428-32.
Fraser, 20,500.
Holmes, T., 17,722-6.
Holmes, R., 18,020, 18,027.
Bladon, 18,148, 18,169, 18,170.
Palin, 18,218-23 18,296-305.
Holmes, J. C., 18,387.
Lightfoot, W., 18,534, 18,535.
Pike, 18,660-3.
Mundin, 18,844.
Barnett, 19,211.
Massey 19,392.
Fitzsimmons, 19,500-2.

witnesses, is clear that it ought not to be regarded as the usual or typical explanation of a reconciliation.

Marsham, 1780–86, 1790–93. Rose, 1910–4, 2075, 2076. Neville, 6852. Atkinson, 6965–70. Halkett, 7233, 7273. Brough, 7794. Grubbe, 12,234. Peacock, 9236. Payne, 11,166–9. Lloyd, 12,419. Lightfoot, G. A., 17,522. Fraser, 20,489. Lightfoot, W. 18,521. Mundin, 18,804, 18,805. Barnett, 19,251. Fitzimmons, 19,513. *Contra.* Garratt, 12,950. Blott, 5828. Rose, 2045–8. Neville, 6902. Atkinson, 7106, 7065–7. Roberts, 8570. Brown, 7373–5. Smith, 7556, 7560, 7561. Dingle, 7983–5. Roberts, 8724. Barradale, 8776–80. Barker, 10,821. Harris, 9528. Sowerby, 9787, 9788. Willey, 10,378. Lloyd, 12,420–2. Wansbrough, 17,444–9. Holmes, R., 18,028. Holmes, J.C., 18,363–6. Fitzimmons, 19,503.

On the whole the present system of separation orders, while in need of considerable amendment, probably fulfils its purpose fairly well. We are largely in agreement with the recommendations of our colleagues for the more careful and more restricted exercise of the powers of magistrates to order separation. But we find it impossible, after listening to the evidence, to regard the existence and multiplication of separation or maintenance orders as indicating any widespread popular demand for multiplied causes of divorce. The witnesses are agreed that the poor do not ask for divorce, and the evidence of those who attribute this silence to the hopeless costliness of divorce proceedings goes rather to the necessity of increasing facilities for using the present law than to the need of its enlargement. It is the latter and not the former with which we are for the moment concerned. It is not a little reassuring to find so many witnesses with first-rate opportunities for learning the truth of the matter convinced that so far as the present ground of divorce, viz., adultery is concerned, it would be a mistake to regard any large proportion of applications for separation orders as cases which, if cost allowed and the facts were really disclosed, might be brought in the Divorce Court. It cannot be doubted, however, that immorality too often precedes a separation order, and is the root of the trouble which has necessitated the application; but the evidence is by no means clear that the order itself is a very frequent cause of misdoing; so far as women are concerned it appears that only a small proportion of orders are set aside on account of their adultery. Mr. Roberts * has made inquiries of all the clerks to justices throughout England and Wales as to whether in their opinion it has been proved, or there is reason to suppose, that the grant of orders of separation leads to immorality. Out of 141 replies to this question 104 are in the negative.

Another indication of the extent to which a demand exists for divorce on other grounds than those now allowed by law will be found in the letters addressed to the Commission itself during the pendency of the inquiry. It will be remembered that the Commission's sittings have been public, that they have lasted for more than two years, and that the evidence has been reported far and wide in the press. The subject is one which excites almost universal interest, and touches both social and individual life very directly. It was certainly to be expected that newspaper reports of the evidence appearing week by week, during a long period, in hundreds of London and provincial journals, with every aid to advertisement which large type effective headlines, and often editorial comment can furnish, would have produced a great flood of letters. But the very reverse is the fact. Of actual concrete cases thus brought under the notice of the Commissioners there are about 350, and if from these are deducted the cases where the present law provides a remedy and those where the only ground pleaded for divorce is incompatibility, there is a residue of less than 200 cases where there might be scope for one or other of the proposed widened grounds for divorce. Even these if they were examined would be found to require further sifting. Some are obviously imaginary narratives invented by the correspondent in order to bring out the supposed hardship of the law. All are *ex parte* statements. In how many cases the writers have suppressed facts which, if known, would disentitle them to any relief or sympathy it is impossible to say, but it is more than probable that such facts exist. Some are really cases not for divorce but for nullity of marriage. On the whole the small number of these letters seems entirely inconsistent with the existence of a wide public demand which has been so sedulously proclaimed. In saying this we are very far from desiring to under-estimate the amount of trouble and suffering which some of these letters reveal. Amongst them are the pathetic records, obviously genuine, of many hard and heartrending cases. The importance of the correspondence addressed directly to the Commission is increased by the fact that the writers of the letters are not confined to any one section of the community; some of them are evidently refined and highly educated, and others almost entirely illiterate. On the other hand, the evidence as to separation orders which we have been considering, and most of the oral evidence laid before the Commission concerns the working classes and the poor only, especially the casual and dock labourer class.

In conclusion, we have heard the evidence of those who represent themselves as the spokesmen of persons desiring or deprecating an extension of the grounds of divorce, and we do not think that this evidence indicates any large or widespread demand for changes other than changes of procedure. We have endeavoured to

R Holmes, 18,000.

* Appendix VI.

draw conclusions from the mass of evidence given to us relating to separation orders, but neither the evidence of the magistrates and other officials who administer this branch of the law, nor that of those who live and work among the poor, and who know the circumstances which precede and follow the making of these orders is in any way decisive as to the need of extension of grounds of divorce for the furtherance of domestic happiness or the raising of the moral standard. There is no doubt a section of society in our large towns in which that standard is deplorably low, but no one who reads the evidence on this point, notably that of Mr. R. Holmes, can fail to see that for the state of things which he describes, no change in the divorce laws could effect a remedy. We feel bound to record our opinion that, apart from such changes as may bring within the reach of all the remedies which the law provides for all, there is no effective demand that divorce should be made easier.

We pass now from the general question of the existence of a public demand for any extended grounds for divorce to the consideration of the particular causes which our colleagues recommend for adoption as new grounds for divorce.

The Proposals of the Majority Report.

The first in importance is desertion. It is recommended that desertion (in which term it is proposed to include wilful refusal to permit marital intercourse without actual abandonment of the home) continuing three years should be a ground for divorce. In Scotland, since the 16th century, desertion for four years has been so treated. The result is that the percentage of divorces in proportion to population in Scotland is double what it is in England. In the United States desertion is the most common ground on which divorce is obtained "owing to the "ease with which the charge may be supported." Mr. Crane, the senior counsel to the American Embassy in London, speaking of the great number of divorce suits founded on failure to maintain the wife (*i.e.*, substantially desertion) and a "mild form of cruelty," stated that "the existence of some form or some degree of mutual "arrangement in a majority of the actions for divorce in the United States may be "taken for granted." Mr. Justice Deane, describing the present system in our own Divorce Court, by which a decree of restitution of conjugal rights, obtained on manufactured evidence and disobeyed, has the effect of malicious desertion for two years, said: "So now if two people choose they can establish, without any wrong-"doing and by the easiest collusion, a decree of desertion. Then the wife goes to "the court and says, 'I have got my decree. Before that I knew my husband had "been guilty of adultery. Give me a divorce.' And they are entitled to it, you "cannot stop it. I think that is all wrong. The whole thing is a collusive arrange-"ment from beginning to end, though you cannot put your finger on it." Although the learned judge's objection was addressed to the present practice of his court established by statute, and not to the inclusion of desertion amongst the grounds of divorce, of which indeed he expressed approval, we cite his words to illustrate the peculiar facility with which desertion can be utilised by persons who desire to "arrange" a divorce. Mr. Barnard, K.C., speaking with great experience of the Divorce Court, put the matter thus: "I think if you have divorce for desertion, it is "practically coming to divorce by consent."

Census Report, U.S.A., p. 19.

Crane, 16,326.

Barratt, 16,686.

Crane, 16,328.

Deane, 848.

Carson, 41,776-81.

Barnard, 4329.

Bigham, 624, 625.
Deane, 849–51.
Barnard, 4195–200.
Priestley, 4526, 4527.
Wansbrough, 17,367-70.
Lloyd, 12,435.
Tooke, 19,947.
Halkett, 7221, 7343-5.
Payne, 11,135.
Wray, 11,103.
Clayton, 41,871, 41,922-4.
Goldstone, 20,965.
Sanders, 8964.
Solly, 10,684-6.
Sykes, 14,124, 14,125.
Fitzsimmons, 19,556.
Peacock, 9267-78.
Holmes, C. H., 18,403, 18,430.
Munden, 18,934.
Daniell, 14,056, 14,057.
(*a*) Marshall, 42,642, &c.
Pearce, 11,372, &c.
Roberts, 8117, &c.
Rowland, 17,580, &c.
Smith, 7515, &c.
(*b*) Willey, 10,229.

The typical case of hardship which is constantly pleaded as an argument for an extension of the grounds of divorce so as to include desertion amongst them, is that of a husband absconding to America or Australia and being entirely lost, so far as his wife is concerned. She does not know whether he is alive or dead, and, although she may be certain that, if alive, he is living in adultery, she cannot prove it. It appears from the evidence that amongst the class of people who use the Divorce Court such cases are common, and it has been too hastily assumed that they are equally common amongst the working classes and the poor. That they exist is, of course, indisputable, but the evidence leads to the conclusion that they are not very frequent. Witnesses with special means of knowledge have been called from Bristol, Cardiff, Gateshead, Grimsby, Hull, Liverpool, London (Thames), Manchester, Newcastle and Plymouth, whence desertion across sea is specially easy. They are for the most part silent as to the prevalence of instances of this type(*a*). Except at Liverpool, where the population is said to change more rapidly than in any other town in England, and at places like Gateshead, where the men's calling (*e.g.*, sailors, sea-going engineers) takes them away, desertion, sadly common no doubt, does not usually seem to take men out of the country, or in many cases out of the neighbourhood of the deserted home(*b*).

It is now proposed to make desertion for three years a condition of divorce. In other countries the period varies from five years in Russia and the Netherlands to one year in Germany and Austria. It is obvious that the pressure of hard cases must always tend towards the curtailment of the required period. Indeed should the law be altered in accordance with the views of our colleagues, it will not be long before its failure to help the poor will become evident. When a husband deserts his home, and leaves a wife and young family to shift as best they can, the economic stress and the moral danger are most pressing at first. To tell a woman under these circumstances, face to face with actual want, and feeling the bitterness of being cast off, that if she can feed and clothe herself and her children and keep respectable for three years she may be allowed to make another matrimonial venture should opportunity offer, is surely very cold comfort. Yet, if the preliminary period is diminished, the probability, always great, is enormously increased of collusive divorces and of rash and hasty divorces which are the outcome of some passing outburst of temper. Few will be found to question that there are cases of the most grievous hardship arising out of desertion, cases which, if a law could be devised which would apply to them only, would have a strong claim on the State for relief. But they cannot be so isolated. If the law is changed it will apply to all cases, and we must face the fact that, in that event, if two married people want to get out of their marriage, there will be nothing to prevent their doing so if, without any ostensible agreement, they choose to separate for a period which to-day it is proposed to fix at three years, but which in some countries is 12 months, and which is certain to grow shorter rather than longer. It is said that collusion is not observed to follow the law as to desertion in Scotland. To which it may be replied that in America, where experience is on a far vaster scale, it has followed to such a degree as to scandalise all decent people. We believe that many of the worst cases of hardship as a result of desertion will be remedied if the proposal in which all the Commissioners concur be adopted for giving a spouse whose partner has not been heard of for seven years an opportunity to obtain an order allowing death to be presumed.

Census Report, (U.S.A.), pp. 336, 362, 379, 384.

It is proposed to make cruelty, which has hitherto been a ground for judicial separation, a ground for divorce. Much of what has already been said with regard to desertion applies with perhaps even more force to cruelty. The legal definition of cruelty is, and always has been, rigorous, but its application to particular cases in the Divorce Court has been of such a nature as to bring very trifling matters within its scope. Lord Mersey (then President of the Probate Division) said, as the result of his experience: "You know that the same story of cruelty may be told by the "husband and the wife in such a way as to create quite different impressions, and "it is difficult to know what cruelty is. It depends very much on the mind of the "man who is trying the case." It is said that the definition of cruelty is strained now because adultery of the husband does not entitle a wife to divorce, unless she can also prove cruelty or desertion, and that the temptation so to strain it will disappear when either ground alone is adequate if established by evidence. But it must be obvious that cases will arise in future, as they have in the past, though perhaps not so frequently, where the success of a divorce petition will depend upon whether cruelty can be made out. It is not unreasonable to assume that the same influences of pity for suffering and indignation at unmanly conduct will operate in the minds of judges and juries as hitherto. In the United States of America, as we have already pointed out, cruelty and desertion are the recognised and much employed excuses for the multitude of collusive divorce decrees which year by year are pronounced there. Speaking of a charge of "a mild form of cruelty" as the easiest mode to procure divorce, Mr. Newton Crane said: "The large number of suits filed, "and the ease with which decrees may be obtained, have a growing tendency to "familiarise the community with divorce, and it must be admitted that it is now "looked upon by people of respectability in certain walks of life as a popular and "firmly established institution. The view is spreading that if an unhappily married "couple desire to have their marriage dissolved it is a matter which is peculiarly "their own affair and one with which the public has nothing to do. If they mutually "agree as to the result, the method of procedure does not much mind as long as it "conforms to the statutes and the rules of court, and provided also that there is no "open fraud upon the court in suppressing and inventing evidence."

Bigham, 621.

Crane, 16,328.

The conception of what constitutes cruelty differs materially in classes and even in families; it may also differ in the minds of judges. A blow in one class of life is not the unforgivable injury that it might be in another: a frankness of sarcastic speech that would be regarded as injurious to "mental health" in one family might be the daily

practice of another and regarded as an agreeable characteristic by themselves and their friends. The definition of cruelty which we are invited to adopt would inevitably promote collusive suits, would leave the dissolution of the marriage tie to the varying discretion of judges and might lead to a divorce being granted to parties who would afterwards bitterly regret the temper in which they had put the law into force.

Insanity is another ground for divorce proposed by our colleagues. The conditions are these. The court must be satisfied that the insanity is incurable, the spouse to be divorced must have been continuously confined under the provisions of the Lunacy Acts for five years, and must be, if a woman, not more than 50 years of age, or if a man not more than 60 years of age at the time of the divorce. Great stress is laid on the number of insane persons in the country. Sir James Crichton Browne, the Lord Chancellor's Visitor, thought the number of persons who would be affected by a change of the law might be between 15,000 and 20,000. The evidence produced before the Commission showed that in the present condition of medical knowledge only a very few insane persons recovered after five years of continuous lunacy. Several witnesses advocated this change of the law on eugenic grounds. It was said that persons suffering from recurrent insanity return to cohabitation during the intervals between attacks, with the result that children with an hereditary taint are propagated. It is to be observed, however, that the proposal of the Majority Report does nothing to meet this point.

Crichton Browne, 34,952.

Coupland, 34,079–84. Jones, 34,232. 34,280–4.

Insanity as a ground for divorce is unique in this respect, that it inflicts dissolution of marriage on a spouse for misfortune, and that even in cases where the insanity is really due to the fault of the other spouse who is seeking divorce. Unkindness and conduct producing distress may be quite incapable of legal proof, and perhaps only known to the unfortunate victim, and yet may be an effective cause of breakdown.

Chambers, 35,865, 35,866. Moore, 41,057,

It is one of the marks of progress of the last half century that insanity has come to be recognised as bodily disease and to be treated accordingly. It is surely a retrograde step to single out insanity only as a ground of divorce while the Majority Report does not venture to recommend that, for example, epilepsy or paralysis should be so treated.

Cooke, E. M., 35,373, 35,375, 35,409–12. Moore, 41,060, 41,061. Winterbotham, 11,601-3, 11,647-9. Clouston, 34,192–214. Hyslop, 34,398, 34,423–5. Crichton Browne, 34,953, 35,000–10.

The evidence, though not unanimous, is clear that in the opinion of medical experts the fact that incurable insanity is made a ground of divorce is likely to have a distressing and highly prejudicial effect both on persons suffering from temporary attacks of mania and on those who, without being insane, may have an apprehension, well or ill-founded, that there is a risk of their becoming so.

Needham, 35,296-301. Chambers, 35,866–73, 35,951–6. Moore, 41,059, 41,096–117. Coupland, 34,107. Hyslop, 34,422. Savage, 36,000–30.

There is no consensus of evidence of any great demand for divorce on the ground of insanity. Witnesses who are themselves in favour of the change, perhaps not unnaturally, think that others agree with them. On the other hand, leading authorities familiar with the working of asylums say the contrary. It is plain from the letters addressed to the Commission that the writers who desire divorce from an insane spouse (almost always husbands seeking release from lunatic wives) are in many cases merely desiring relief from an irksome expense.

Clouston, 34,223.

Cooke, E. M., 35,376. Moore, 41,182–4.

The great majority of experts on mental disease who gave evidence were very decidedly opposed to the proposal to make insanity a ground of divorce. This majority included four Commissioners in Lunacy, the Lord Chancellor's Visitor and a specialist of quite unique authority on this subject, Sir George Savage. His evidence is well summed up in his final answer: "There is no doubt of the "individual hardship, and that I have felt. I entered upon it with a feeling, I must "say, rather in favour of the divorce, but the more I have considered the indi- "vidual reports from these people, and the more I have considered my own 40 years' "experience, I cannot help thinking that there is not ground enough to justify the "alteration." We cannot admit that evidence of this character should be brushed aside as it is in the Majority Report on the singular ground that witnesses such as commissioners in lunacy and medical officers of asylums "would object to any enact- "ment which might prejudice in any way the welfare and comfort of those under "their charge." That is extremely probable, but we may be permitted to add that they are also the best judges of what would be "prejudicial to the welfare and "comfort of those under their care." We are bound, therefore, to accept their verdict that the adoption of this proposal would retard the recovery of the curable, painfully aggravate the lot of many of the incurable, and even help to upset the balance of some who, without being insane, are liable to become so. Without at all underrating cases of individual hardship to the sane partners, we cannot recommend a remedy for them which would be thus crudely callous to all other consequences.

Crichton Browne, 34,945. Coupland, 35,103. Needham, 35,277. Cooke, E. M., 35,365. Chambers, 35,848. Savage, 35,984, 36056–7. Moore, 41,043.

Savage, 36,057.

The proposal in which all the Commissioners concur, that when one party to a marriage is of unsound mind when it is contracted, and the other party is ignorant of the fact, the latter should be entitled to apply for a decree of nullity, will, if adopted, provide a remedy for some at least of these cases.

It will not be forgotten that the proposed Uniform Divorce Law for the United States does not contain insanity as a ground for divorce, and that during the last few years several States where this ground was recognized have, by express legislation, affected its abolition.

Habital drunkenness is proposed as a good cause of divorce in cases where a separation order on this ground has been made and, at the expiration of three years from its date, the drunkenness is found by the Divorce Court to be incurable.

There can be no question of the misery and mischief caused by a drunken husband or wife, especially amongst the poor, and in the interests of children more effective machinery is required for the enforced detention of inebriates. But we regard the present time, when there are hopeful signs that drunkenness, viewed as a disease, is likely to become amenable to treatment, as a peculiarly unsuitable one for stamping it with the finality and irreparableness implied in making it a ground for the dissolution of marriage. We note the extremely guarded language of Dr. Branthwaite, H.M. Inspector under the Inebriates Act, who, although of opinion that divorce should be allowed in "the worst cases, and under definite conditions to prevent abuse," admitted that "broadly speaking, divorce for inebriety would benefit the sober party "only, or practically so, and would be detrimental to the inebriate one." Branthwaite, 41,312.

Imprisonment where there has been a death sentence commuted to imprisonment for life is proposed to be made a ground of divorce. The scope for the application of this cause for dissolution of marriage is so limited that it is hardly conceivable that, if it stood alone, it would be regarded as a sufficient reason for disturbing the present law. Unless, therefore, divorce for desertion, cruelty, and insanity are admitted, we may perhaps disregard this proposal. If they should be admitted it is not easy to see that long terms of imprisonment can with consistency be omitted as good causes of divorce. If this ground is admitted at all it appears to be exceedingly difficult to draw a line, and to say that a death sentence commuted to imprisonment for life (*i.e.*, about 20 years) shall be a good cause, but a sentence, say, for 15 years shall not be so. The fact that the death sentence, if carried out, would have determined the marriage, seems inadequate as a justification unless in other respects the prisoner is to be treated as deceased. Some witnesses consider that even a moderate term of penal servitude should be made a reason for divorce, but the weight of evidence was entirely against a proposal which, in the attenuated form in which it survives in our colleagues' recommendations, seems to go either too far or not far enough.

Alverstone, 15,527. Desart, 15,830–49, 15,921, 15,922, 15,927–34.

Alverstone, 15,587.

Alverstone, 15,526. Lewis, 1460, 1462–6, 1546–52. Thomson, 40,511. Cooke, J. B., 40,558–628. Treadwell, 40,641–702. Desart, 15,830–49, 15,921, 15,922, 15,927–34. Alverstone, 15,525–8, 15,580–7, 15,608, 15,609, 15,639–41.

The Lord Chief Justice's evidence on this point deserves most careful attention. His Lordship's view may be gathered from the following: "(*Q.*) You make no "distinction, I understand, between criminals for the purpose of the point we are "considering?—(*A.*) I do not make any distinction in principle. If you say would "you mind this being applied to a man who has a life sentence, the case Lord Gorell "put, that is far less objectionable: but I am dealing with the general principle, "and, so far as I can apply my mind to which side one's judgment should fall, I am "not prepared to draw the distinction; but I answer you at once frankly that there "would be less objection to dealing with extreme cases than to the average ordinary "case of penal servitude. For anything like 3, 5, or 7 years I do not think that the "wife ought to get divorced. The man has often been most faithful, her children "are his children, and I do not think the affection is always put on. In some "cases one knows that it is put on. In a very large number of cases I have tried "appeals on the ground of the wife and children are, I believe, really genuine. (*Q.*) I "was asking for the benefit of your assistance, because I think there is such a "great difficulty in saying at what period you would draw the line. (*A.*) I am "not prepared to make it a part of the punishment or a consequence of the offence "in any case."

On the question whether there is a demand on the part of the innocent spouse to have the opportunity of divorcing a convict partner, the evidence of Mrs. Hodder, who for 11 years past has been chiefly engaged in visiting prisoners' wives and families, is important. She says: "I have during that time seen some 3,000 cases; "I have analysed my books, and find that 1,575 were long-sentence cases, ranging "from 1 to 20 years; the remainder were of shorter duration. During the whole "of my experience in dealing with these people I have never heard of one Hodder, 40,705.

" desiring divorce; the great majority of the women are very faithful to their " husbands."

We have now dealt with the five new grounds for divorce which our colleagues recommend should be established. There is one distinctive mark on them all. They are purely empirical in the sense that they are tentative, experimental, dependent upon qualification and degree. Desertion for three years is chosen, but we are told that if the well-to-do only were concerned four years would have been recommended. Under pressure of sufficient hard cases it might equally easily become two. Insanity is to be a cause, not only under conditions of time, but also of the age of the parties. Imprisonment under a commuted death sentence for, say, 20 years is to suffice, but not penal servitude for 10 or 15 years. Cruelty is to be a cause, but it needs to be defined, and is defined in a set of words which may mean anything from gross personal violence to the continuous exercise of a sharp tongue or the habitual indulgence in a surly temper. Inebriety is to be a cause, but the proposed definition of it leaves much to the discretion of the court and is admitted to be open to criticism. Some witnesses are in favour of drunkenness being a ground of divorce, but against penal servitude being so, and *vice versâ*. It is obvious that proposals like these have not even the semblance of finality. They are frankly opportunist, designed to meet what are supposed to be the practical needs of the moment, and capable of expansion in any direction under the pressure for further facilities, which concession is almost certain to produce. They must be judged, not only by their immediate and intended results, but by their inevitable sequel. If the State is to maintain any clear attitude as to divorce, it must take its stand upon some guiding principle. There is one principle, and, so far as witnesses, many of whom seek to deal with the question, have been able to help us, only one, which seems to include the various proposed extensions of the grounds of divorce. Each one of these is said to predicate a state of circumstances which proves that the purposes for which the marriage contract was entered into have been defeated, with the consequence that the combined life which it was the purpose of that contract to establish is in fact, and finally, determined. We suppose that this is what is meant by our colleagues when they recommend that divorce should be permitted for causes which " are generally and properly recognised " as leading to the break up of married life," or, as they elsewhere describe it, the " *de facto* termination of married life." What is to be regarded as " breaking up " married life? Is it separation? The separated parties may come together. Is it drunkenness? The drunkard may reform. Is it penal servitude? The prisoner may return better and chastened by punishment. Is it physical disability? Then permanent paralysis of the body may frustrate the objects of marriage as fully as paralysis of the brain. Moreover, if we accept this principle it must carry us much further than is now proposed. The conditions of the marriage contract are not only that the parties will live together and cohabit without exposing each other to bodily suffering. They promise to love one another, to take one another " for better for " worse, for richer for poorer, in sickness and in health " during their joint lives; and these promises are as much of the essence of the matter as any of the other obligations of the marriage state. The united life described in these familiar words may be fatally wounded and swept away without desertion, or cruelty, or insanity, or inebriety, or imprisonment. Who can judge, for example, the effect of unkind words, or studied neglect and indifference, offences which no court can grapple with, but which, nevertheless, may be destructive of real union? That union is determined when husband and wife have ceased to love one another. If, therefore, we are to adopt the principle we have stated, it follows that divorce ought to be permitted when it is clear that the parties have irreparably lost affection for each other, or, indeed, when either party has become permanently alienated from the other.

Majority Rep., pp. 98, 99.

The dilemma that presents itself is this. On the one hand, it is in the highest degree dangerous and unstatesmanlike to deal with so momentous a matter as marriage and divorce on notions of present expediency, without any governing principle to guide us; on the other hand, the only principle suggested is one which requires that divorce should be granted on the mutual consent of both parties, and on proof of the invincible aversion of either of them for the other. The Majority Report, it is true, does " not recommend these two causes as grounds of divorce." The reason assigned is significant. It is stated thus: " These suggestions have met with little support from " any of the numerous witnesses who have been called before us and are not likely to " meet with any substantial support at the present day in England." In other words, divorce for incompatibility and divorce by mutual consent are laid aside, not because they violate any principle on which the Majority Report is based, but merely because,

Majority Rep., p. 113.

for the moment, no effective demand for them can be discerned. But the inevitable conclusion of the premises adopted by our colleagues cannot be evaded. The evidence of several witnesses of distinction in different ways shows that they, at any rate, accept the position. Thus, Sir John Macdonell, at the very outset of the inquiry, advocated divorce by mutual consent, provided it be suitably safeguarded. Mr. Plowden, the police magistrate, thought that marriage is a "purely civil contract" and that it would be "an admirable thing" if it "could be put an end to by the consent of the parties." Mr. Maurice Hewlett, the well-known novelist, stated that in his view "bodily desire and spiritual intention to unite" are the essence of marriage, and that "if a man cease to desire his wife, or if he desire another woman," he ought to be entitled to apply for a divorce. Miss Llewelyn Davies, the general secretary of the Women's Co-operative Guild, stated the views of some members of her guild thus: "When man and wife agree to part, I feel it would be much better for the morals of "both to grant a divorce. All our members are most emphatic that where husband "and wife could not live happily together it was no real marriage, it was a life of "fraud without love. Nothing but love should hold two together in this most "sacred of all bonds." The suggested remedy is divorce. Miss Llewelyn Davies herself was of opinion that divorce should be granted whenever there was "a serious "desire on the part of either of the parties not to live with the other," and she explained that this would apply to the case of a man who wanted to be freed from his wife in order that he might live with another woman. Miss Llewelyn Davies added that in saying this she was expressing the opinions of the members of the guild generally, though some might not be so advanced. The guild, as already stated, numbers 25,897 members, respectable married women of the well-to-do working class. Of the 124 selected members to whom Miss Llewelyn Davies specially addressed inquiries, 82 were in favour of divorce by mutual consent.

Macdonell, 393. Plowden, 18,999, 19,045–50. Hewlett, 43,576. Davies, 36,998. Davies, 36,989. Davies, 37,048. Davies, 37,049–53. Davies, 36,965–8.

It is significant that a considerable number of the letters addressed to the Commission by persons who wished to plead for relief in their own cases deal not with any matrimonial offence, but are simply records of incompatibility, that is to say, from husbands or wives who have made a mistake, or find that they are not suited to one another, and claim on that ground that they ought to be liberated by law, and ought to be allowed to make a fresh marriage. The following is a typical instance: "I married when very young and more than a quarter of a century ago. "I separated by mutual consent (foolishly perhaps). As the law at present stands "neither my wife nor myself can obtain a divorce though I should much like to "be free, there are many cases of this sort, and if the law was only altered as "proposed by many that after a certain number of years' separation either party "could obtain a divorce it could injure no one and would give many much more "happiness."

Davies, 36,997, 36,998.

Whether divorce by mutual consent is likely to be adopted *eo nomine* is not the point, and is not practically very important. One of the strongest reasons for not allowing desertion and cruelty as good causes of divorce is the ease with which they may be utilised for the dissolution of marriages of which the parties have simply grown tired, and mutually desire to make an end. It will be remembered that experience in the United States emphatically confirms the reality of this danger, the recognition of which has been a main factor in producing the recent demand for reform to which we have already referred. The danger lies not merely in the risk of a misuse of law in individual cases, but in the creation of a habit of mind in the people; for there is evidently a tendency in the United States for husbands and wives and their friends in certain classes of society to see no discredit in divorce based on allegations of cruelty or desertion, while judges make no effort to detect collusion, but consider it to be their duty to facilitate divorce whenever the parties are obviously tired of one another's society. Divorce as the result of mutual arrangement is "looked upon by people of respectability in certain walks of life as a popular "and firmly established institution." We submit that the proposals of the Majority Report cannot be viewed apart from the principle upon which they are founded, and the consequences which logically follow, and have in fact followed, upon its adoption. Those proposals, if carried out by legislation, would lead the nation to a downward incline on which it would be vain to expect to be able to stop half way. It is idle to imagine that in a matter where great forces of human passion must always be pressing with all their might against whatever barriers are set up, those barriers can be permanently maintained in a position arbitrarily chosen, with no better reason to support them than the supposed condition of public opinion at the moment of their erection. But if the principle which lies behind the proposals of the Majority Report

Crane, 16,328, 16,503–9.

be once admitted, with all that it necessarily implies, the result would be practically to abrogate the principle of monogamous life-long union.

Would the adoption of our colleagues' proposals, with the consequences which, however undesired, must follow, be for the general welfare of the people of this country? That is the question we have to answer. We believe the preponderating voice of history and experience would answer in the negative, and that in giving that answer it would be supported by the verdict of the best and wisest of those in every age who have striven to promote the moral advancement and the happiness of the human race.

The Proposals in relation to the Christian Faith.

It is in this context that the teaching of our Lord cannot be put on one side. We have already said that in our opinion it is impossible to expect from non-Christian subjects of the State submission, as a matter of course, to the rules laid down by Christ for His own followers. We do not, therefore, conceive that the duty of the State is simply to translate into Acts of Parliament those canons, however venerable, of the Christian Church which have been supposed by it to express our Lord's mind as to divorce; although it may well be that to our forefathers such a course would have seemed obvious and proper. But it is the duty of the State to legislate for the general good of the whole nation, and in determining what will promote that end we must look for guidance, not to ephemeral conditions of the moment, even though enforced by sympathy with individual suffering, but to the fullest knowledge and the highest wisdom we can invoke. Every citizen has his share, direct or indirect, in determining the action of the State. It is, therefore, for each of us to measure for himself what weight he will give to the various materials upon which his judgment in this matter should be based. To those, and they form the great majority of the nation, who profess allegiance to the Christian Faith in one form or another it will be almost axiomatic that our Lord's teaching as to the true conditions of family and social life was intended to promote the general welfare of the world, and has for all Christian people a pre-eminent authority and an imperative claim to their loyal acceptance. That seems the necessary result of a belief in His unique personality. It is, therefore, of the utmost importance to turn to the words of Christ, if not for specific and final rules on divorce, yet certainly for the principles and ideals which make for the moral welfare of mankind.

Barnes, 37,426–31.
Birmingham, Bp., 21,241.
Cooper, 39,190.
Denney, 38,783, 38,790–8.
Ely, Bp., 23,058–63.
Henson, 22,585–7.
Inge, 38,678.
Moyes, 22,921.
Paterson, 23,274–8.
Rashdall, 39,306.
Sanday, 38,499, 38,531.
Scott Lidgett, 39,720, 39,721.
Jones, J. D., 41,968, 41,993.
Swete, Mem., vol. iii, pp. 316, 317.
Whitney, 39,012–8.
Wood, 40,379–85.

A considerable number of bishops and other learned clergymen and ministers, English and Scottish, professors of divinity and of Church history of the Universities of Oxford, Cambridge, Glasgow, Edinburgh, and London, representative members of the Church of England, the Roman Catholic Church, the Wesleyan Methodists, and the Congregational Union were examined as witnesses. Their evidence disagreed on matters of biblical criticism and exegesis, and as to the true construction to be put upon various well-known passages of Scripture dealing with this subject. Into these matters we do not enter. It is obvious that this Commission is not so composed as to be competent to speak with authority on such questions. But what is far more important, and indeed exceedingly impressive, is the absolute unanimity of these witnesses upon the fact and the nature of our Lord's teaching to the world on marriage and divorce. All are agreed that Christ intended to proclaim the great principle that marriage ought to be indissoluble. There is wide divergence as to whether the ideal thus held up by our Lord was or was not intended by Him to exclude any exceptions, but there is no doubt in the minds of any of the theological witnesses as to that ideal itself. To quote one of them (Dr. Inge): "It seems clear that "Christ in the words so variously reported by the Evangelists intended to inculcate a "higher view of the sacredness of marriage than was held by the Rabbis of either school. "Divorce had been allowed by Moses 'for the hardness of your hearts,' but 'from "the beginning,' that is to say, according to God's intention, marriage is essentially "an inviolable contract terminable only by death." When we compare the principle thus enunciated and vouched for by this remarkable concensus of authority as truly representing our Lord's teaching, with the principle, if there be any, which underlies the recommendations of the Majority Report, we find them irreconcilable. If the one is calculated to promote the public good the other cannot be so. That marriage should be normally life-long and indissoluble, and that marriage should be dissoluble on grounds which lend themselves to the easiest collusion, and which seem necessarily to involve the right of either partner to put an end to it at will, are contradictory propositions. If the nation desires, as we believe it does, to maintain

the ideal of life-long obligation, it cannot permit Parliament to lay down a long and increasing list of statutory exceptions, some of them dependent for their effect upon the construction of terms, which do not admit of precise definition, by judges who may well vary in their intellectual and moral attitude towards these questions of divorce.

The Proposals in relation to Family Life.

There are reasons at the present time which lead us to think that the State is called rather to strengthen than to relax the strictness of its marriage laws. It cannot be said that the natural tendencies of human society at the present time are moving in favour of an ideal of family life based upon a union life-long in its character. One might almost say that the family is the fundamental and permanent problem of human society, but the strength, coherence, and continuity of the family are threatened by two counter forces, (*a*) the assertion of individual liberty; (*b*) the claims of logical Socialism. As to the former there is a very widespread claim on the part of individuals for liberty from the restraints of marriage whenever they become difficult and irksome. As to the latter, logical Socialism is contending that the family stands in the way of the solidarity of the State, and this tendency is operative in many continental countries and in some of our own colonies. Much of the evidence brought before us in the interests of what is called eugenics follows the same line. It may be added that within the family itself, even in our own country, the same spirit of reluctance to accept the discipline of marriage is shown in the growing reluctance to accept its natural consequences, the production and rearing of children. The evidence in this respect of the increasing decline of the birth-rate in England and in Australia cannot be ignored. To these influences tending to disintegrate the family and the home must be added the increasing restlessness of modern life in all classes and the social effects of modern industry and of the massing of people in great towns. There are strong tendencies at work breaking up the family life and the continuous union of man and wife, which is its basis. "The problem of the family "is not merely a contemporary issue between expediency and idealism, but is one "element in the vastly larger problem of human progress and destiny. This is the "full scope and social importance of the problem with which the Divorce Court "and the Ecclesiastical Courts are trying to deal." The real question at issue is the alternative between the narrow expediency of trying to make the lot of certain parties concerned easier and happier, and the wider expediency of strengthening the family life against influences which are threatening its strength and stability. Moreover, the effort to promote that narrower expediency tends to defeat the effort to promote the wider expediency. Experience shows that on the whole increase of facilities and grounds of divorce leads to domestic instability. There is abundant evidence that the classes mainly affected by the Divorce Court are becoming less careful of the restraint and the obligations of family life. This certainly seems to be the effect of divorce legislation in the United States, and as we have already stated, it has led there to a strong and increasing reaction. The remarkable words of President Roosevelt make it plain that the danger is felt to be real and pressing and one which calls for serious and united effort to resist it.*

"Jesus Christ and the Social Question," by F. G. Peabody (Macmillan), 1904, p. 134.

The ultimate question therefore, the question which must be borne in mind in considering the difficulties and hardships which a high ideal of marriage inevitably involves, is whether at a time when tendencies disintegrating family life are strong, when, in America, to name but one country, where divorce has been made easier and wider, there is a strong reaction in favour of greater strictness, the State in England should relax its marriage laws—whether it ought not firmly to maintain them at least at the present standard. In other words, is the State in England to leave a position of comparative strictness towards which many citizens in other countries, such as America, appalled by the consequences of relaxation, are now painfully struggling to return? There can be no question that hitherto the strength of English social life has been the family—the home. The evidence is reassuring that among the great bulk of the people, especially among the middle class and artisans, the obligations of marriage are respected, and home life is pure and consistent. There can be little question that the reason for this state of things is the general social conviction that marriage binds those who enter it for better or for

* "There is a widespread conviction that the divorce laws are dangerously lax and indifferently "administered in some of the States, resulting in a diminishing regard for the sanctity of the marriage "relation." Message to Congress, January 30, 1905. Census Report, Introduction, p. 4.

worse. It is a life-long obligation with all the sacrifice which such an obligation involves. Our contention, therefore, is that the State, in its own interest, should maintain and not relax the standard of its present marriage law. It is in the interest of the State to strengthen the sense of responsibility in entering the married state, and the willingness of mutual sacrifice in continuing it. The provision of exceptions to the life-long tie of marriage must tend to weaken the very things that the State desires to strengthen. Will people be more careful about marrying where there is a suspicion of drinking habits, or lunacy, if it is known that when drunkenness or lunacy develops divorce with permission to re-marry may be easily obtained? Again, will people be more willing to make mutual sacrifices and allowances if they know that a careful absence of moderate duration may set them free?

It must not be supposed that in pressing these considerations we are either ignoring or seeking to minimise the great amount of suffering which now exists, and has always existed, in relation to ill-regulated marriages. Weakness and wickedness, selfishness and ignorance produce their inevitable results in this as in other departments of human life. The tragedy of an unhappy marriage is deepened a hundredfold by the pitiful misery it almost always brings on the children who suffer for the sins of their parents. But the fallacy we desire to deprecate is the tacit assumption that these ills are in any measure due to the lack of opportunity for divorce. Even as a remedy its practical limitations are obvious. If, for example, a wife with young children is to benefit by divorce, it is necessary (1) that a fresh husband should be found willing to undertake the burden of his predecessor's offspring, and (2) that when found he will be a better husband than the first. But, be that as it may, it is plain that we must seek the cause of matrimonial trouble at a much earlier stage than that which has been reached when the possibility of divorce becomes a practical question. The causes of marriage failure are, speaking generally, the lack of the sense of responsibility in entering the married state, and the lack of self-control, self-sacrifice, and sense of duty in continuing it. To attempt to deal with these matters by multiplying grounds of divorce is surely to attack the problem at the wrong end. That the problem is one as important as it is difficult no one will deny. Legislation improving the social environment of the working classes may do something. A more permanently effective system of elementary education would make young men and women far better equipped for family life. Possibly some restraint on the present freedom of adults to contract marriage without regard to conditions of health, or ability to maintain a family, may be practicable, and, if practicable, would certainly do something to diminish the number of unsuitable and unhappy marriages. But the only real remedy we believe will be found not so much in Acts of Parliament as in such influences as can be exerted to rouse the conscience and stimulate the moral sense of the nation.

The Proposals as touching the relations of Church and State.

If the recommendations of the Majority Report should be adopted and divorce should be made legally possible for the causes approved by our colleagues, it will become urgently desirable on grounds both of expediency and of justice that the relation of the Church of England to the marriage law should be reconsidered. As has already been stated, under the existing law about 61 per cent. of marriages in England are solemnised in church by clergymen of the Church of England. Every man and woman is entitled to require the incumbent of the parish within which he or she resides to solemnise his or her marriage, subject to formal conditions as to time, banns, consent, &c., and also to questions of the religious profession of the parties which have never been definitely decided. The parties must of course be legally competent to marry each other, and if either of them has been divorced for adultery, or if it is a case of marriage with a deceased wife's sister, a clergyman may refuse to officiate. There has for many years been considerable difficulty in connection with the marriage in church of divorced persons. If the State should decide to multiply the grounds of divorce it is certain that the great majority of the clergy will decline to officiate at the marriages of persons so divorced, and a large number of them will refuse to admit such persons to Holy Communion. The Church of England's present standards of belief and conduct do not contemplate the marriage of persons who have been already married and have been parties to decrees for divorce on the ground of desertion, cruelty, insanity, drunkenness, or imprisonment. It is significant that the Chairman of the Commission admits that if the views advanced in the memorandum which he tendered as evidence, and carried out in detail in the

20 & 21 Vict. c. 85, s. 57.
7 Edw. 7. c. 47. s. 1.
Resolutions of Upper House of Canterbury Convocation, App. XXV. c. (18).

proposals of the Majority Report, be accepted, the marriage "service seems to be out "of keeping with modern thought and to need reconstruction." It is, we need hardly say, most improbable that the Prayer Book will be altered so as to make it consistent with enlarged views of divorce which are alien to its teaching, and which it seems to be admitted involve a departure, even if a necessary departure, from an ideal recognised by the State itself. Gorell, Vol. III., p. 544, paragraph 104.

It is in the interests of the State that the Church, as the special guardian and trustee of Christian principle, should be encouraged to strengthen the loyalty of its own members to that principle for the sake of its value to the State. The State stands to gain in the interests of its own ideal of marriage as a lifelong union, and not to lose, if the Church is permitted to maintain that ideal with a strictness which the State may desire but cannot attain. Any Christian society, therefore, should be at liberty to give or withhold its own religious sanction to marriages to which the State reluctantly, but under pressure of social facts, feels compelled to give its civil consent. Nor do we think that there is anything inherent in the relations of Church and State which ought to withhold this liberty from the Church of England. The relationship of Church and State ought to be one not of subservience of the one to the other, but of co-operation within different spheres towards common ends. In the case with which we are now concerned this common end is the strengthening of the ideal of marriage as a life-long obligation. We urge the recognition of the liberty of the Church to exercise discipline over its own members in accordance with its own principles, not only in the interests of the conscientious convictions of Churchmen, but in the interests of the State itself.

It is outside the province of this Commission to make concrete proposals on this matter, especially as they would be designed to meet a state of circumstances which we trust will not arise. We desire, however, to state that in our opinion the Divorce Act of 1857, apart from any enlargement of the grounds of divorce, requires amendment so as to remove altogether any legal obligation on a clergyman to solemnise the marriage of a divorced person, and further so as to abrogate the right conferred by the Divorce Act on a person divorced for adultery to the use of his parish church for the celebration of his marriage. Should the recommendations of our colleagues be carried into effect, other or more radical changes might become inevitable. The only way out of a position of intolerable difficulty might be that the State should in all cases require and concern itself only with a civil ceremony of marriage. But we desire to say, that in our opinion the abolition of the religious solemnisation of all, or of a great majority of marriages would be a very great evil. We agree with the opinion expressed in the Report (1868) of the Royal Commission on the Marriage Laws, that it ought to be the aim of statesmen to attach the religious sanction to marriage. Further, it would be essential that any concession to the conscientious convictions of clergymen should be made with due regard to the constitution and discipline of the Church of England as a religious society. 20 & 21 Vict. c. 85. ss. 57, 58. Report of R.C. on Marriage Laws, 1868 [4059], p. xxxiv.–v. St. Albans, 21,161–9, 21,211–5.

We recommend that, subject to the recognition of equality between the sexes, the law should not be altered so as to extend the grounds of divorce.

The Question of Jurisdiction. Local Courts.

With regard to the question whether greater facilities are necessary to enable persons of slender means living at considerable distance from London to exercise their statutory rights under the Divorce Acts, it is of course incontestable that no one ought to be deprived of his legal rights merely by poverty. Further, the evidence has in our opinion established that (*a*) the centralisation of all divorce business in London, and (*b*) the cost of divorce proceedings, have in fact prevented a considerable number of poor persons and persons of small means from bringing suits in the Divorce Court, which, but for the expense, they might have brought successfully. We concur in the recommendation of our colleagues that local courts exercising the jurisdiction of the High Court should be established. We also agree that it will be convenient that these courts should be held at centres where there is already a District Registry of the High Court. We do not agree with the proposal of our colleagues that these local courts should be forthwith opened in the whole of the 89 towns in England and Wales where District Registries exist. In our opinion a very much smaller number of local courts will meet the real need, while the wholesale facilities which it is proposed to offer are, in our opinion, likely to have a gravely unsettling influence on large classes of the people who would otherwise never contemplate, and who ought not to contemplate, divorce. It would be disastrous if Clarke, 42,176-80.

divorce were made too easy, or if the views of some witnesses who, for example, regard it as a hardship that a man should lose a day's work over his divorce, were allowed to prevail. We recommend that local courts should be opened in a few centres only, with liberty to the Lord Chancellor to increase the number if and when it becomes necessary.

Our colleagues propose that the local divorce courts should be presided over by county court judges, of whom 8 or 10 are to be selected and to act as Commissioners for a year or more, going from court to court and giving their whole time to this business, while the work of their own county courts is to be left to deputies paid by the Treasury. In our opinion this arrangement is undesirable and bad. If the number of centres be limited in the way we propose, a very much smaller number of Commissioners than eight or ten will suffice. We recommend that in the first instance two should be appointed by the Lord Chancellor (with power given to him to increase the number), and that they should be chosen rather with reference to the special function they are to discharge than because they are county court judges. There seems no advantage in taking men away from work which at present occupies them fully, and which in their absence has to be left to deputies, in order that they may undertake other work of which they have no experience. Further, the effect of the proposal that after a year they should return to their own duties and be replaced by other county court judges, if carried out, must be that divorce law will always be administered in the local courts by judges without experience in that law. The importance of such experience was pointed out by the Lord Chief Justice and by the judges of the Probate Division in their evidence. Moreover, these relays of judges always new to the work would lack the assistance of trained officials and a Bar thoroughly familiar with the law and practice of matrimonial causes. It is idle to suppose that tribunals thus manned and equipped would dispense justice of the same quality as would be available to the rich suitor who could take his case to the court sitting in London. It cannot be doubted that the advantage of experience will be best secured if the Commissioners are in all respects supplemental judges for the divorce business of the Probate Division, and are in close and constant touch with the ordinary divorce judges.

Appendix VII., statement by General Council of Bar as to congestion of business in County Courts.

Alverstone, 15,500. Bigham, 591. Deane, 914–5.

Alverstone, 15,502.

It is proposed that the local divorce courts, presided over by county court judges, should only be open to litigants of small means, and that others should be obliged as now to come to the London court. This will be wholly mischievous if the arrangements are made on an assumption that the matrimonial affairs of the poor are of less consequence, and to be confided to a less important judge, than those of the well-to-do. Until now the business of inferior courts has been limited by the amount at stake in the litigation, not by the means and social position of the litigants. We are of opinion that the Commissioners should be empowered to take any divorce case whether in London or in the local courts, and that it should be open to the President of the Division to arrange the work of each sittings in such way as he deems expedient. If, for instance, he thought fit on some occasion himself to take a series of cases in local centres, and to leave a Commissioner to take London business in his absence, he ought to be able to do so. If the local courts were thus made, so far as the judges are concerned, really, as well as nominally, equal to the London court, there would be much less objection to the former being reserved for the exclusive use of litigants who could not afford to bring their cases to London.

Wrigley, 14,411–7.

Points of Agreement with the Majority Report.

Majority Report, pp. 70–82, pp. 120–138.

We concur in the recommendations of the Majority Report as to costs and generally as to procedure and practice, both as to divorce in the High Court and as to magistrates' orders under the Summary Jurisdiction (Married Women) Act, 1895, and the Licensing Act, 1902, except so far as those recommendations contemplate the substitution of divorce for mere separation in certain cases where magistrates' orders have been made.

Majority Report, pp. 116–119.

We concur in the recommendations of the Majority Report with regard to the nullity of marriage in cases (*a*) of unsound mind, (*b*) of epilepsy and recurrent insanity, (*c*) of venereal disease, (*d*) when a woman is pregnant at the time of marriage by a man other than the husband, who is ignorant of the fact, and (*e*) of wilful refusal to consummate the marriage.

Majority Report, pp. 119–120.

We concur in the recommendations of the Majority Report with regard to "presumption of death."

We concur in the recommendation of the Majority Report that whatever grounds are permitted to a husband for obtaining a divorce from his wife, the same grounds should be available for a wife in a suit against her husband. Majority Report, p. 89.

With regard to the questions relating to the publication of reports of divorce and other matrimonial causes, we concur in the recommendations of the Majority Report. We desire, however, to add that if the number of courts exercising divorce jurisdiction should be increased to anything like the extent contemplated by our colleagues, the difficulty of preventing divorce cases from being indiscriminately reported in newspapers, especially in the provinces, will be largely increased. Indeed, it appears to us unlikely that the recommendations proposed by our colleagues would, in the event supposed, be found adequate to counteract an evil which is great enough now, but which would then become very much greater. Majority Report, pp. 156–7.

We desire to express our cordial appreciation of the kindliness as well as of the ability with which the Chairman has presided over our deliberations. His knowledge and experience have always been placed freely at the service of his colleagues, and thus, while differing from his conclusions in certain matters which we regard as fundamental, we have gladly followed his guidance in a number of recommendations for the amendment of the law on points of great practical importance.

We desire also to associate ourselves with our colleagues in their appreciation of the able services which the Secretary, the Assistant Secretary, and the staff have rendered to the Commission.

All which we humbly submit to Your Majesty.

COSMO EBOR:
WILLIAM R. ANSON.
LEWIS T. DIBDIN.

2nd November 1912.

INDEX.

The references to the Majority Report are to paragraphs.
,, ,, ,, Minority ,, ,, pages.

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